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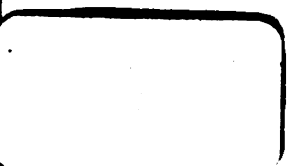
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REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA.

By JOHN S. RUNNELLS,
REPORTER.

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BEING VOLUME LVI OF THE SERIES.

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PREFACE.

WITH this volume will close my work as Reporter. I cannot forbear to embrace the opportunity of expressing my many obligations to the members of the Supreme Court for the uniform kindness with which they have treated my efforts to properly present their work to the public.

I wish also in this connection to acknowledge the assistance of Mr. Howard M. Kellogg, to whose ability, care, and painstaking effort, I am largely indebted for whatever of excellence may be found in the reportorial work of the more recent volumes.

JOHN S. RUNNELLS.

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AS AT PRESENT CONSTITUTED.

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D. D. MIRACLE, Circuit Judge.

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C. F. LOOFBOUROW, Circuit Judge.

14TH DISTRICT.. ED. R. DUFFIE, District Judge.
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OF
Cases in Law and Equity,
ARGUED AND DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
DES MOINES, JUNE TERM, A. D. 1881.

IN THE THIRTY-FIFTH YEAR OF THE STATE.

PRESENT:
HON. AUSTIN ADAMS, CHIEF JUSTICE,
" WILLIAM H. SEEVERS,
" JAMES G. DAY, }
" JAMES H. ROTHROCK, } JUDGES.
" JOSEPH M. BECK,

WELCH V. JUGENHEIMER.

1. **Evidence: DAMAGES: SALE OF INTOXICATING LIQUORS.** In an action by a wife to recover damages for injuries caused by the sale of intoxicating liquors to her husband evidence to show that the husband when intoxicated used abusive language toward his family is inadmissible, it not being shown that the plaintiff's health was affected thereby. Following *Calloway v. Laydon*, 47 Iowa, 466.
2. —: —: —. Evidence showing the number and ages of the plaintiff's children is also inadmissible to affect the amount of damages in such an action.

56	11
80	695
56	11
91	584
56	11
93	750
56	11
118	172
56	11
120	489
122	26
56	11
141	62

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3. —: —: —. The admission of immaterial and incompetent evidence held prejudicial error.
4. **Intoxicating Liquors: DAMAGES FOR SALE OF: WHEN RECOVERABLE.** The sale of intoxicating liquors to a husband does not give the wife a right of action against the seller, under the statute, unless such liquor causes, or contributes to, the husband's intoxication.
5. —: —: —. Damages are recoverable for the giving of liquor to one who is at the time intoxicated, or in the habit of becoming intoxicated, the same as though the liquor was sold.
6. **Evidence: OF CRIMINAL ACT: DEGREE OF PROOF REQUIRED.** In a civil action to recover damages for an act which is also indictable as a crime such fact does not render necessary a higher degree of proof, a preponderance of evidence, only, being necessary to establish the cause of action. *Barton v. Thompson*, 46 Iowa, 30, *overruled*. Whether the same rule would be applicable to cases of slander and libel, where a crime is charged and justification pleaded, *quere*.

Appeal from Washington Circuit Court.

THURSDAY, APRIL 21.

THIS action was instituted against William Jugenheimer and William Jugenheimer, Jr., to recover damages for the selling of beer to her husband, Clay Welch, a person, as is alleged, in the habit of becoming intoxicated, and intoxicated at the time of the sales. Pending the trial the plaintiff dismissed her action as to William Jugenheimer, Jr. The trial resulted in a verdict and judgment in favor of the plaintiff against the other defendant for \$500 and costs. The defendant appeals.

Ed. W. Stone and Wilson & Kellogg, for appellant.

McJunkin & Henderson, for appellee.

SEEVERS, J.—I. Against the objection¹ of the defendant the plaintiff was permitted to testify, respecting her husband, as follows:

“*Question.* State how did he treat the family when in this condition; what maltreatment you received?”

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Answer. "Not very good. He would come home and if everything, both his work and mine, was not done all up, he would curse and abuse the family. I was compelled to get up out of bed at a late hour and do work of any kind while he was in that condition. Sometimes, if I did not have wood plenty, he would growl about it, and curse and swear that he had left me there to do the work, and wanted to know why I did not do it." Another witness was permitted to testify as follows:

1. EVIDENCE:
damages:
sale of in-
toxicating
liquors.

Question. "Now state if at any time when in this condition, you saw him abuse his family?"

Answer. "I could not hardly say; I can only say he was cross and ugly."

Another witness was allowed to testify as follows: "When he is intoxicated he is pretty cross to his family, and when he aint intoxicated, he is as good as the common run of men to his family. When he is intoxicated, he will cuss his family and jaw his wife. Once down at his mother's before she had the conversation with Jugenheimer, the defendant, I was present; they wanted to go home, and he cussed her and told her to get her shawl or he would go off and leave her." Other testimony of like character was admitted. It was all inadmissible under the rule recognized by this Court in *Calloway v. Laydon*, 47 Iowa, 456. There was no evidence whatever that the abusive language and conduct referred to tended in any way to impair the plaintiff's health.

II. The plaintiff was also permitted against the defendant's objection to testify as follows:

Question. "Now, you may state to the jury how many members in the family you have, and their ages, that is, the ages of your children?"

Answer. "One. She will soon be three years old; she will be three years old in February." This testimony was
2. —: —, improperly admitted under the rule established
—, by this court in *Huggins v. Kavanagh*, 52 Iowa, 368, and *Weitz v. Ewen*, 50 Id., 34.

Welch v. Jugenheimer.

III. Against the objection of the defendant the plaintiff was also allowed to testify as follows, with reference to her husband:

Question. "What did he say, if anything, about attending and helping you in the case?"

Answer. "Why, he said he would never do that; he demanded his fees, and I did not have them for him, and he :—; told me that I might take the papers back, that he would not take them; he would not take the copy. He said if he was fetched up he would go against me; he said he never would have anything to do with it, and if he was fetched up he would go against me. Yes, I worked for some of the provisions, dresses, and so on; I do not remember that he furnished anything, but he might."

This testimony is not relevant to any issue in the case. Its only effect would be to create an undue sympathy for the plaintiff on the part of the jury, and thus unfit them in a measure for a calm, cool and dispassioned consideration of the case. The evidence should not have been admitted.

IV. The evidence shows that the defendant's brewery is situated outside the corporate limits of the city of Washington. The plaintiff was permitted to introduce an ordinance of the city of Washington prohibiting the sale of beer within the corporate limits, and also to prove that no license had been issued for the sale of beer in the city. It is insisted by the appellee that this testimony was admitted to rebut the claim of the defendant that the plaintiff's husband procured the beer, causing the injuries complained of, in the city of Washington. The evidence, we think, was not competent for this purpose. It could have no effect upon the issues in this case except upon the presumption that persons within the corporate limits would not violate the ordinance, and that, therefore, the law must have been violated by the defendant. There can be no presumption that persons within the corporate limits are more law abiding than those without.

V. The court instructed the jury as follows: "If you find

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from the evidence that defendant did sell beer to plaintiff's husband within the two years prior to August 14, 1879, and you further find from the evidence that at the time of such sale or sales, as the case may be, the plaintiff's husband was either intoxicated, or was then a person in the habit of becoming intoxicated, and the plaintiff has shown that she has been damaged thereby in her person, property, or means of support, then she may recover such actual damages thus sustained, as shown by the evidence. And in addition thereto you may, if you think proper, allow vindictive or exemplary damages."

This instruction is erroneous. Section 1557 of the Code gives to the wife who shall be injured in person, property, or means of support by her intoxicated husband, or in consequence of his habitual intoxication, a right of action against any person who shall, by selling intoxicating liquors to her husband, cause his intoxication. The mere selling of intoxicating liquors to a person intoxicated, or in the habit of becoming intoxicated, does not of itself confer the right of action. In order that a right of action may exist the liquor sold must cause, or contribute to, intoxication, and the wife must sustain some injury by the intoxication. It is apparent that if the plaintiff's husband bought beer from the defendant, the plaintiff may have been damaged to the extent of the price paid and the value of the time spent at the defendant's brewery, although the beer so bought may not have contributed to his intoxication, and may not have been drunk by him. This instruction would allow a recovery under just such a state of facts. Under the instruction it is not made essential to a recovery that the beer sold should have caused, or contributed to, intoxication.

VI. The defendant assigned as error the giving of the following instruction:

"The Statute also provides that courts and juries shall
 a. —: —: construe the law hereinbefore recited so as to
 —: —: cover the act of giving, as well as selling, by per-

 Welch v. Jugenheimer.

sons not authorized." It is claimed that section 1554 of the Code containing this provision is not applicable to the act of giving intoxicating liquors to a person intoxicated or in the habit of becoming intoxicated. This question was determined adversely to the position of appellant in *Church v. Hingham*, 44 Iowa, 482.

VII. The defendant asked the court to instruct the jury that it is a violation of the criminal statutes for a person to

6. EVIDENCE: sell or give to another, while intoxicated, any in-
 of criminal act: degree toxicating liquors, and that the jury must be sat-
 of proof isfied beyond a reasonable doubt that the defend-
 required. ant so did, before they would be warranted in finding against him. This instruction was refused and the jury were instructed that a preponderance of the evidence was sufficient to enable the plaintiff to recover. This action of the court is assigned as error. *Barton v. Thompson*, 46 Iowa, 30, was a civil action to recover damages for willfully and maliciously setting fire to certain stacks of wheat, and it was held that the plaintiff must satisfy the jury beyond a reasonable doubt that the allegations in the petition were true, before he could recover. The correctness of this decision has been questioned by counsel in several cases which have been before us, and authorities cited which were not before us when that case was determined. It is proper, also, to say that we were largely influenced in making the ruling in *Barton v. Thompson* because of the rule which this court at an early day had adopted in the actions of slander, it being regarded as doubtful whether a distinction could be drawn between such actions and any other civil action in which a crime is charged. A more careful examination of the books satisfies us that whatever may be the rule in actions of slander or libel, where a crime is charged and a justification is pleaded, the rule in *Barton v. Thompson* is in conflict with the weight of authority and cannot be sustained on principle, and is, therefore, overruled. That the authorities are conflicting must be conceded. The doctrine that where a criminal act is charged in

a civil action it must be established beyond a reasonable doubt before there can be a recovery is approved in 2 Greenleaf on Evidence, § 408, Taylor's Ev., 97, and Bishop on Marriage and Divorce, § 644. It is disapproved in 2 Wharton on Ev., § 1246, Cooley on Torts, 208, and Proffatt on Jury Trials, § 335.

The only case cited by Greenleaf in support of the rule is *Thurtell v. Beaumont*, 8 Eng. Com. Law., 531; 1 Bing., 339. This case was decided in 1823, and we are not aware that it has been followed by the courts of England. In relation thereto it has been said: "The decision on this point in *Thurtell v. Beaumont* was made on application for a rule, and without much consideration. It has never received approbation in the English courts, although as a rule of evidence occasions have repeatedly arisen for its adoption and application." Depere, J., in *Kane v. Hibernia Ins. Co.*, (N. J.) 17 Am. Law Reg. (N. S.), 293.

Leaving out of view for the present actions of slander and libel, the following cases should be regarded as adhering to the rule adopted in *Thurtell v. Beaumont*, *supra*; *Thayer v. Boyle*, 30 Me., 475; *Butman v. Hobbs*, 35 Id., 228; *McConnell v. Mutual Ins. Co.*, 18 Ills., 28; *Pryce v. Security Ins. Co.*, 29 Wis., 270, and *Freeman v. Freeman*, 31 Wis., 285. The following cases have been cited as also adhering to the rule. *White v. Comstock*, 6 Vt., 405; *Brooks v. Morse*, 10 Id., 37, and *Riker v. Hooper*, 35 Id., 457, but as these actions were brought to recover statutory penalties there is some doubt whether a rule applicable to them should prevail in civil actions brought to recover damages.

In the following cases the rule aforesaid is disapproved: *Washington Union Ins. Co. v. Wilson*, 7 Wis., 169; *Blaiser v. The Milwaukee Mechanics Ins. Co.*, 37 Wis., 31; *Knowles v. Scribner*, 57 Me., 495; *Hoffman v. Western Ins. Co.*, 1 La. An., 216; *Schmidt v. Ins. Co.*, 1 Gray, 529; *Bissel v. West*, 35 Ind., 54; *Young v. Edwards*, 72 Penn. St., 267; *Ins. Co. v. Johnson*, 11 Bush, 587; *Rothschild v.*

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Ins. Co., 62 Mo., 356; *Munsen v. Atwood*, 30 Conn., 102; *Elliot v. Van Buren*, 33 Mich., 49; *Bradish v. Bliss*, 35 Vt., 326; *Kane v. Hibernia Ins. Co.*, before cited.

In some of these cases instructions were approved which required more evidence to enable the plaintiff to recover when the cause of action was based upon a crime than in other civil actions because of the presumption of innocence which prevails in all cases. That is, the evidence must so far preponderate as to overcome such presumption. But the rule that a preponderance is sufficient still remains intact, for the ruling only amounts to this: that the preponderance of the evidence must be sufficient to overcome not only the other evidence but the presumption of innocence, such presumption being regarded as an established fact to be overcome, as are other facts; and this, we think, must be so.

The rule that guilt must be established in a criminal action beyond a reasonable doubt was engrafted on the common law because of a tenderness for, and in favor of, persons charged with crimes which affected their lives and liberties, at a time when the criminal law was harshly administered, and cruel and harsh punishments were inflicted for slight and trivial offenses. It has been retained when in a great measure the reason for its adoption has ceased. A conviction for a crime is followed by penal consequences affecting the life and liberty of the person charged. Not so in a civil action. And the general rule in this class of actions is that the rights of the parties must be determined by a preponderance of the evidence. In criminal actions the good character of the person charged may be shown as a defense, and it may entitle him to an acquittal. *The State v. Northrup et al.*, 48 Iowa, 583. While in civil actions no such rule obtains, nor can, unless in exceptional cases, the good character of the person charged with a crime be shown. *Bays v. Herring*, 51 Iowa, 286; 1 Greenleaf on Ev., § 54.

As the rule in criminal actions is that the evidence must establish the guilt of the person charged with crime beyond

a reasonable doubt, and the rule in civil actions is that a preponderance of the evidence is sufficient to enable the injured party to recover whatever damages he has sustained because of the alleged criminal act, it cannot be said a recovery in the latter has the force and effect of a conviction in a criminal action in so far as it tends to degrade the person against whom the recovery is had, because he has not been found guilty of any crime as required by the laws of the land. Therefore it is that it has been well said there may be a recovery in a civil action, although the alleged crime on which the action is based has not been established.

As the consequences which follow a recovery in a civil action are so materially different from those which follow a conviction in a criminal action, and as the reason for the establishment of the doctrine of reasonable doubt has no application to civil actions, we do not think the rule should be extended to the latter, unless slander and libel, when a crime is charged and justification pleaded, constitute an exception. In one or more of the above cited cases it is said this is so. Whether such conclusion is well grounded we are not agreed, and, as it is unnecessary to determine it at this time, we do not do so. We deem it proper, however, to call attention to the fact that it was held in *Bradley v. Kennedy*, 2 G. Greene, 231; *Forshee v. Abrams*, 2 Iowa, 571; *Fountain v. West*, 23 Id., 9, and *Ellis v. Lindley*, 38 Id., 461, that in such actions a plea of justification charging a crime must be established beyond a reasonable doubt. The opinion in *Fountain v. West* was written by Dillon, J., but in *Scott v. Home Ins. Co.*, 1 Dillon, 105, in which case it was pleaded as a defense that the plaintiff had set fire to and caused the building insured to be burned, the jury were instructed that the doctrine of reasonable doubt did not apply. The rule held in the cases above cited in this State is the direct opposite to that held in *Elliott v. Burrell*, 60 Me., 209; *Folsom v. Brown*, 5 Foster, 114, *Matthews v. Huntly*, 9 N. H., 146, and *Kincaid v. Bradshaw*, 3 Hawks (N. C.), 63, and this latter rule is

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said to be correct in Cooley on Torts, 208. In our opinion the Circuit Court did not err in refusing the instruction asked, and in instructing as was done.

For the errors before considered the judgment is

REVERSED.

BARNES ET AL. V. THE COUNTY OF MARSHALL.

1. **Taxes: RECOVERY OF LOCAL AID TAXES: LIABILITY OF COUNTY.** A county acquires no beneficial interest in taxes voted in aid of a railroad and paid to the county treasurer, and cannot be held responsible for their repayment when forfeited by the railroad company. The claim of the tax-payer for the recovery of such taxes is against the fund in the hands of the treasurer, and not against the county, and no order of the board of supervisors is necessary to authorize their repayment. BECK and SEEVERS, JJ., *dissenting*.

Appeal from Marshall District Court.

THURSDAY, APRIL 21.

ACTION to recover for money paid as a tax to aid in the construction of a railroad, and alleged to be refundable under the statute.

The plaintiffs aver in their petition in substance that the tax was paid on the 12th day of December, 1871, to aid in the construction of the Burlington, Cedar Rapids & Minnesota railroad; that the company has failed to construct the road, and has abandoned the same; that by reason of such failure the tax on the 12th day of December, 1873, became forfeited; that the plaintiffs have demanded of the county treasurer, and the board of supervisors, the repayment of the tax, but the county treasurer refuses to repay the same, and the board refuses to audit and allow the same, or cause a warrant to be drawn therefor.

To the petition the defendant demurred upon the following grounds:

86	89
81	100
56	20
97	555
100	621
56	20
144	328

1st. Because the treasurer of Marshall county, to whom the tax was paid, and who by law was required to repay the same, and his bondsmen at that time, are liable for the repayment of the taxes.

2d. This action is based upon an implied contract to repay taxes, and the plaintiffs' right to recover the same has not accrued within the five years last preceding the commencement of this suit, but before that time.

3d. Because there is no allegation in the petition that the defendant has ever appropriated said money to its use, or that the same has been distributed to any particular county fund.

4th. Because the treasurer of Marshall county, who collected said tax, is the agent of the plaintiffs to receive said tax, but not the agent of the defendant for its collection, as the tax is raised for a private corporation, and for private purposes, and not for any public purpose.

5th. Because said money has never gone into and become a part of the money belonging to the treasury of Marshall county, and cannot so become under the laws of Iowa, and if collected and not kept or disposed of as required by law it is a wrongful conversion by the treasurer, for which he and his bondsmen would be liable.

6th. Because there is no common law or statute requiring a county to refund a tax voluntarily paid, except such as has been erroneously and illegally exacted and paid.

7th. Because it is shown by said petition that on the 12th day of December, 1873, it became and was then the official duty of the then county treasurer of Marshall county to repay said tax to the persons entitled thereto; and more than three years have elapsed since said date, and before the commencement of said action.

The court sustained the demurrer, and rendered judgment for the defendant. The plaintiffs appeal.

 Barnes v. The County of Marshall.

Henderson, Merriman & Carney, for appellants.

O. Caswell, for appellee.

ADAMS, CH. J.—A local aid tax is not collected for the benefit of the county, but for the benefit of the corporation that is to be aided, and in contemplation of law, perhaps, for the benefit of the townships voting the aid. The tax is to be paid to the county treasurer, and deposited in the county treasury. If the county should wrongfully appropriate the same to its own use, it would, we presume, become liable therefor. In this case the petition shows that the tax is still in the treasury. The only complaint made of the county is that its board of supervisors have refused to audit and allow the claim, and have refused to cause a warrant to be drawn therefor. The question presented is as to whether the county is liable for such refusal. It certainly is not unless the plaintiffs' right was affected by the refusal.

Taking the averments of the petition to be true it was the duty of the county treasurer to refund the tax. Chapter 102, section 3, session laws Thirteenth General Assembly. This we think he might do without any order of the board. In *Butler v. The Board of Supervisors*, 46 Iowa, 327, it was, to be sure, intimated that in a supposed case it would be proper for the board to order a local aid tax illegally collected to be refunded. See, also, *Lauman v. The County of Des Moines*, 29 Iowa, 310, in regard to the obligation of a county to refund a tax illegally collected. But in the case at bar the tax was not illegally collected. The plaintiffs' right rests solely upon the fact that the tax was paid more than two years prior to the commencement of the action, and had not been earned by the company. The tax, we think, was refundable by simple demand upon the treasurer. If it was refundable only upon a warrant duly drawn by the county auditor, the sanction of the board would be necessary. Code, §

321. But the tax was refundable without a warrant, unless the tax was payable to the county. Code, § 327. It was payable to the county treasurer, and was, when paid, to be deposited in the county treasury. But it should be kept as a distinct fund, subject merely to the rights of the company and special tax-payer. In no event could the county acquire any beneficial interest therein. It follows, we think, that in case of misappropriation by the county treasurer, or loss in any way without the fault of the county, the loss should fall upon the company or special tax-payer, and not upon the county or general tax-payers. The plaintiffs' claim, then, is strictly a claim against the fund, and not against the county. Such being the case it appears to us that it was not one to be audited and allowed by the board, and a warrant to be drawn therefor. If so the plaintiffs' tax should have been refunded by the treasurer upon demand, and the county did not become liable by reason of anything which the board omitted or refused to do.

If, as the parties intimate in their arguments, the tax is not in the treasury, but was misappropriated by the predecessor of the present treasurer, it cannot, of course, be refunded (except by way of reimbursement for loss from a different fund, which we hold would be improper) nor would the present treasurer be liable therefor.

In our opinion the demurrer was properly sustained.

AFFIRMED.

BECK, J., *dissenting*.—I. The statement of the pleadings made in the opinion of the majority of the court requires an important averment of the petition, namely: That the money collected as taxes from plaintiffs, which they seek to recover, is wholly unpaid.

The demurrer resists plaintiffs' right to recover in this action, as it will be discovered upon the consideration of the whole pleadings, upon these grounds:

1. The money was paid to and received by the treasurer

of defendant in a private capacity as agent of plaintiff, not officially as treasurer of the county, and the money was not paid into the treasury of the county nor used and appropriated as public funds.

2. The action is barred by the statute of limitations.

II. It has been held by a majority of this court, in more than one decision, that the statute authorizing the levy of taxes to aid in the construction of railroads is constitutional, for the reason that the building of railroads is a public purpose for which taxes may be levied. See *Stewart v. Board of Supervisors*, 30 Iowa, 9. This case has been frequently approved. See *Renwick et al. v. Davenport & Northwestern Ry Co.*, 47 Iowa, 511.

If the statute provided for the levy of taxes for a private purpose it would, according to the doctrine recognized by all courts, be in violation of the constitution. The taxes involved in this case were, according to the settled rule of this court, levied for a public purpose. They were authorized by a vote of the people and when so authorized they were levied and collected as all other taxes. Their collection was made by the county treasurer, and when delinquent the payment was enforced by distress of goods or sale of lands, in the same manner as all other taxes levied by the county. See chapter 102, Acts Thirteenth General Assembly.

The statute above cited, under which the taxes were levied, gives no support to the positions assumed in the demurrer that the taxes were not paid to the county treasurer in his official capacity, but were received by him as the agent of the tax-payers, and the money was not, therefore, paid into the county treasury.

The statute authorizes the county treasurer to collect the taxes, which are levied by the county and placed upon the tax books. They are collected in the same manner as other taxes. It is impossible to suppose that the legislature intended the collection of this tax, levied for a public purpose, to be made by a private person. The act designates the person

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charged with the collection of the tax by his official title, and prescribes his duty in language of the same purport that it uses in prescribing his duties pertaining to other taxes. That the statute requires the taxes collected under its provisions to be paid into the county treasury is not left to inference. The proviso of the third section prescribes that if the taxes be not withdrawn from the county *treasury* within two years the treasurer shall repay the money to the tax-payer. Here is an express declaration that taxes under the statute are found in the county treasury. Of course they were deposited in the treasury by the treasurer.

We have, then, the case of taxes paid for a public purpose into the county treasury. They are held by the county in trust for the objects to which the law appropriates them. *D. M. & M. R. Co. v. Lowry*, 51 Iowa, 486. In this respect they do not differ from other taxes for special purposes, paid into the county treasury, as the school taxes, bridge taxes, taxes for the support of the insane, etc. The fact that these taxes are not appropriated to purposes connected with the county government does not authorize the conclusion that the county is not interested in the purposes for which they were collected. The county, as a branch of the government of the State, is charged by the law with the duty and responsibility of collecting and disbursing these various taxes. They are collected for public purposes, and their disbursement within the county is a public benefit which is enjoyed by the people of the county. The law charges the county with the duty of returning to the tax-payers the money collected for the construction of railroads, if it be not used for that purpose. As the money is in the treasury of the county, the tax-payer cannot seek payment elsewhere.

As we have seen, the taxes under the law are paid into the treasury of the county. The petition avers that the money still remains there. The law declares that if the taxes are not withdrawn from the county treasury within two years after collection, the money shall be repaid to the tax-payer.

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Who should be responsible for the return of the money? It is very plain that the county treasurer is not, for he holds the funds for the county. It is equally plain that the county is responsible, for the fund which the tax-payer seeks is found in its treasury. To my mind the question will not admit of further argument.

III. The action is not barred by the statute of limitations. The defendant became liable to repay the tax Dec. 12, 1873, at the expiration of two years from the date of the payment. The action was commenced October 10, 1878. The period of limitation is five years. Code, § 2529, ¶ 4.

Actions against public officers are barred within three years. § 2529, ¶ 3. This provision is not applicable to the case before us, which is not prosecuted against an officer, but against the county.

In my opinion the judgment of the District Court ought to be reversed.

SEEVERS, J., concurs in the conclusions I have expressed in this dissenting opinion.

 ADKINSON V. BREEDING.

1. **Descent: PERSONAL PROPERTY EXEMPT FROM EXECUTION.** Where a husband dies leaving personal property which was exempt from execution in his hands, and such property is taken possession of by his widow, she will not be deprived of her right thereto under the statute by the fact that no inventory and appraisement were made as provided for by section 2371 of the Code.

Appeal from Madison Circuit Court.

FRIDAY, APRIL 22.

THIS is a controversy as to the ownership of certain personal property. It appears from an agreed statement of facts, upon which the case was tried in the court below, that Alex-

Adkinson v. Breeding.

ander Blair died intestate, Oct. 5, 1876, and Martha Blair was his widow. February 23, 1877, Martha Blair intermarried with one James Wilson, and on December 5th, 1877, said Martha Blair Wilson died. At the death of Alexander Blair he left certain articles of personal property which were exempt from execution against him, and of the value of \$355, which said Martha Blair, at his death, took into her possession, and retained until her death. On December 7, 1877, and after the death of said Martha Wilson, the defendant was appointed administrator of the estate of Alexander Blair, deceased. He took possession of said property as belonging to the estate of said Blair, and on the 14th of January, 1878, he sold the same in pursuance of an order of court for the sale of personal property belonging to said estate, and reported the proceeds of said sale to the court. On the 11th day of January, 1878, plaintiff was appointed administrator of the estate of said Martha Wilson, and on the next day he notified the defendant in writing that he claimed said property as assets of the estate of which he was administrator, and demanded the surrender of the same.

Upon the foregoing facts the Circuit Court found that the plaintiff, as administrator, was entitled to recover the value of the property as a claim of the third-class against the estate of Alexander Blair, with interest from January 12, 1877, and costs. Defendant appeals.

Wainwright & Miller, for appellants.

McCaughan & Dabney, for appellee.

ROTHROCK, J.—I. If the property in controversy at the death of Alexander Blair descended absolutely to his widow, Martha Blair, and she took it into her possession, and retained it until her death, it was the personal property of her estate; her administrator was entitled to the possession of it, and the seizure and sale of it by the defendant was wrongful. The question

1. DESCENT:
personal
property ex-
empt from
execution.

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to be determined is: was Martha Wilson the owner of the property at her death?

Section 2371 of the Code is in the following words: "When the deceased leaves a widow all personal property which in his hands as the head of the family would be exempt from execution, after being inventoried and appraised, shall he set apart to her as her property in her own right, and be exempt in her hands as in the hands of the decedent."

Counsel for appellant contends that the property did not vest in Martha Blair because it was not inventoried, appraised and set apart to her, and that at her death it was assets of the estate of Alexander Blair, to be administered upon, the same as other personal property of the estate.

We think this an improper construction of the statute, at least as applicable to the facts of this case. There is no dispute as to the character of the property. It was exempt from execution in the hands of Alex. Blair. His widow took and retained possession of it while she lived. It was not assets of the estate of Blair to be administered upon as such. *Ellsworth v. Ellsworth*, 33 Iowa, 164. The law vests the property in the widow absolutely. The purpose of the inventory and appraisement is to identify it in order to determine that it is in fact exempt from execution, and set it apart from the other property not exempt. But the widow's right to that which by the law is hers absolutely does not depend upon the inventory and appraisement. In this case it is not only conceded that the property was in fact exempt, but that the widow took possession of it and retained it during her life. We have no doubt that it was her property under the statute, and that the administrator of her estate was entitled to it as assets to be administered upon.

II. It is urged that the court erred in allowing the claim as one of the third-class. It is said it should be established if at all as one of the fourth class, because it was not at any time filed as a claim against the estate. Code, § 2420.

This appears from the pleadings to be an ordinary action

The State v. Pennell.

against the defendant for seizing and appropriating property which was not assets of the estate of which he was administrator. The court below found, as we think correctly, that the property did not belong to the estate. It was the plaintiff's right to recover the value of the property thus wrongfully taken without filing a claim against the estate. An administrator cannot wrongfully take the property of a stranger, and convert it into money, and then claim that the rights of the lawful owner shall be postponed to the claims of the creditors of the estate. We think the defendant is not in a position to complain of the classification of the claim made by the Circuit Court.

III. It appears from the abstract that interest was allowed on the value of the property from January 12, 1877. No demand of the property was made until January 12, 1878, and plaintiff concedes that interest should be computed from the latter date. The judgment will be modified accordingly.

MODIFIED and AFFIRMED.

THE STATE V. PENNELL.

1. **Criminal Law: INDICTMENT: CONSTRUCTION OF.** An indictment for rape construed and held to sufficiently charge the crime.
2. **Instruction: FAILURE TO ASK: PRACTICE IN THE SUPREME COURT.** Where an instruction given contains affirmative error it will not be sustained by the Supreme Court merely because the appellant failed to ask an instruction expressing the correct rule.

56	29
86	619
56	29
106	89

Appeal from Calhoun District Court.

FRIDAY, APRIL 22.

THE defendant, under the name of Frank Dunn, was indicted for the crime of rape, and convicted of an assault with intent to commit rape, and he now appeals to this court.

The State v. Pennell.

Hudson & Wright, for appellant.

J. F. McJunkin, Attorney General, and *J. M. Toliver*,
for the State.

ADAMS, CH. J.—I. It is assigned as error that the indictment does not show the name of the person alleged to have been ravished.

The indictment is in these words: "The said Frank Dunn on or about the 11th day of April, 1879, in the county of Calhoun aforesaid, did with force and arms at the
1. CRIMINAL
law: indictment of:
construction
of. county aforesaid, in and upon one Elizabeth J. Smith, unlawfully willfully and feloniously make an assault and did then and there ravish and carnally know, forcibly against the will of the said Elizabeth J. Smith." The defendant insists that it is not charged that he ravished and carnally knew Elizabeth J. Smith, or any other person. According to his construction of the indictment the words "ravished" and "know," as therein used, have no object. But it appears to us otherwise. If the language of the indictment were that "the said Frank Dunn did then and there ravish and carnally know, forcibly against her will, the said Elizabeth J. Smith," there would be no difficulty. The words "ravish" and "know" are what are called transitive verbs. Their meaning is not complete until they are *carried over* in the mind and applied to their object. In the case above supposed they would need to be carried over an intervening clause thrown in to modify them. The same is true in the language actually used. Adopting what we deem a correct punctuation, the meaning appears to us clear. The charge is that the defendant "did then and there ravish and carnally know, forcibly against the will of, the said Elizabeth J. Smith." The verbs to "ravish" and "know" being transitive are to be carried over and applied to their object, Elizabeth J. Smith. The sentence is certainly not a model one,

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but there is no reasonable doubt as to its meaning, and the indictment appears to us to be good.

II. The court charged the jury, in substance, that in case they found the defendant guilty they would necessarily find him guilty of rape, or of an assault with an intent to commit rape. The defendant insists that the court erred, in that a simple assault is one of the degrees of offense included in the offense charged, and that the instruction excluded such degree from the consideration of the jury.

2. INSTRUCTION: failure to ask: practice in the supreme court.

The Attorney General concedes that it would have been proper to instruct the jury that, under the indictment, the defendant might be convicted of a simple assault, but he contends that a failure to so instruct, in the absence of a request to that effect, is not reversible error.

If the error complained of consisted simply of a lack of fulness in the instruction given, a different question would be presented. But the instruction affirmatively precluded the jury from finding a verdict of a simple assault. Where an instruction contains an affirmative error, we cannot sustain it merely because the appellant failed to ask an instruction which would have contravened it, and expressed the correct rule.

The question involved in this case was decided in *State v. Walters*, 45 Iowa, 390. *State v. Vinsant*, 49 Iowa, 244; *State v. Glynden*, 51 Iowa, 463.

For error in the instruction given the judgment of the court below must be reversed and the case remanded for another trial.

REVERSED.

MADISON COUNTY V. KRIDLER ET AL.

1. **Mortgage:** TO SCHOOL FUND: COUNTY AUDITOR. A county auditor has no power to release real estate from a mortgage executed thereon to the county for the use of the school fund.

Appeal from Madison Circuit Court.

FRIDAY, APRIL 22.

ACTION to foreclose a mortgage. The facts are stated in the opinion.

McCaughan & Dabney, for appellants.

No appearance for appellees.

SEEVERS, J.—The defendant Mary J. Kridler, and her husband, borrowed a sum of money from the school fund, for which they, with McCaughan & Dabney as their sureties, executed a promissory note to the plaintiff, and the said Mary and her husband executed a mortgage on certain real estate to secure the same. This action was brought to recover on the note and foreclose the mortgage.

McCaughan & Dabney answered the petition, admitting the execution of the note and mortgage, and made their answer a cross-petition, and therein alleged they were sureties on the note; that the county auditor had released a portion of the real estate from the lien of the mortgage, which they pleaded he had no authority to do, and, therefore, the mortgage was a valid lien on all the mortgaged premises. They further alleged they did not know the amount due, asked the court to ascertain the same, and, when done, offered to pay the same, and asked to be subrogated to all the rights of the plaintiff.

Afterward the court found the amount due, and the same was paid by McCaughan & Dabney, and thereupon the court

Madison County v. Kridler.

entered a decree subrogating them to all the rights of the plaintiff, and the cause was continued. From this decree neither party appealed, and no exception was taken thereto. Afterward Mary J. Kridler and her husband answered the cross-petition, and pleaded the release of the mortgage as to a part of the real estate by the county auditor upon their paying a *pro rata* amount of the money secured by the mortgage, and that said release was afterward ratified and approved by the board of supervisors; that after said release they sold to one W. H. Brown the real estate so released, and they asked that it be adjudged the mortgage was not a lien thereon. To this answer McCaughan & Dabney replied denying each and every allegation therein, and insisting the county had no power or authority to release said mortgage.

The court rendered judgment in favor of McCaughan & Dabney for the amount due on the note, foreclosed the mortgage as to the portion of the premises included therein, but decreed the release by the auditor, which was ratified by the board, to be valid, and that said mortgage was not a lien on that portion of the premises described in the mortgage. From this decree McCaughan & Dabney appeal.

I. The board of supervisors "hold and manage" the securities given the school fund. Code § 1860, 1881. The auditor is authorized to make loans, but he has no authority to receive money paid or due such fund. If he does so such act is void. *Mahaska Co. v. Searle et al.*, 44 Iowa, 492; *State v. Ruan et al.*, 45 Id., 328. It follows, we think, the auditor has no authority to release a portion of the mortgaged premises upon the payment of a *pro rata* amount of the money secured thereby. This involves a discretion and power on the part of the auditor which the statute clearly, in our opinion, does not confer.

II. There is no evidence tending to show the appellees had sold the land released from the lien of the mortgage, or that such release had been approved by the board of super-

Fort Des Moines Lodge No. 25, I. O. O. F., v. The County of Polk.

visors. Conceding, therefore, the board has such power there is an utter failure to so show. Such fact cannot, therefore, be regarded as established. This being so the court erred in holding the mortgage was not a valid lien on the premises described therein. The court should have rendered a decree foreclosing the mortgage as to all the real estate described therein. The cause will be remanded to the court below with directions to enter a decree in accordance with this opinion.

REVERSED.

FORT DES MOINES LODGE No. 25, I. O. O. F., v. THE
COUNTY OF POLK ET AL.

- 1. Taxation: PROPERTY OF BENEVOLENT SOCIETY: WHEN NOT EXEMPT.**
A building owned by a benevolent society and leased for pecuniary profit is taxable, although built with a fund which was exempt, and into which the rents are paid.

Appeal from Polk Circuit Court.

FRIDAY, APRIL 22.

THE material allegations of the petition are, in substance, as follows:

The plaintiff is a corporation organized under the laws of Iowa for benevolent and charitable purposes. It created a "widows' and orphans' fund" for the purpose of carrying out the object and intent of its organization. Said fund is used exclusively for the maintenance of the widows and orphans of deceased members of said lodge. In 1854 the fund had accumulated to some extent and it was deemed best by the plaintiff to purchase therewith certain lots in the city of Des Moines and erect thereon a business block, which was done. The money expended for that purpose belonged

Fort Des Moines Lodge No. 25, I. O. O. F., v. The County of Polk.

exclusively to said fund, and the plaintiff holds the legal title to said real estate in trust for the purpose for which it was intended. Since the erection of said building the same has been leased for business purposes, and the income appropriated to paying for repairing the building and necessary expenses connected therewith, and the remainder placed in said fund, which has been exclusively devoted to the purpose for which it was created.

The said real estate has been assessed for taxation, and the ordinary taxes have been levied thereon, and it is prayed that the collection of said taxes be enjoined, upon the ground that said property is not, under the law, liable to taxation.

There was a demurrer to the petition, which was sustained. Plaintiff appeals.

Wright, Gatch & Wright, for appellant.

John A. McCall, for appellees.

ROTHROCK, J.—The only question for determination is whether the said real estate is exempt from taxation.

1. TAXATION: Counsel for appellant concede the rule to be that
 property of exemption from taxation is the exception, and
 benevolent society: that it must rest on some clear expression of
 when not exempt. the legislative will. Turning to the statute, we

find it provides as follows: "The following classes of property are not to be taxed: * * * * All public libraries; grounds and buildings of literary and religious institutions and societies, devoted solely to the appropriate objects of these institutions, * * * * and not leased or otherwise used with a view to pecuniary profit." Code, § 797.

Keeping in view the rule above stated, this section of the statute must be construed as requiring the property in question to be taxed. Indeed, it, in effect, declares that leased property shall not be exempt from taxation. Under the statute it is immaterial to what the income from leased property

Wheeler v. Cox.

is devoted. The property being leased for business purposes, and an income obtained therefrom, its status as taxable property is thereby fixed. This distinguishes the case from *The Trustees of Griswold College v. The State*, 46 Iowa, 275, and *Cook v. Hutchins*, Id., 706.

Counsel for appellant in an able and ingenious argument maintain that the money, before it was invested in real estate, was not taxable, and that accumulations thereof derived from loaning it would also have been exempt, and as this investment was made to accomplish the same object, the same result should follow. But it seems to us the conclusive reply to this argument is that the statute does not so provide.

AFFIRMED.

WHEELER V. COX ET AL.

I. ATTORNEY: PRESUMPTION OF AUTHORITY: EVIDENCE TO OVERCOME.

The presumption that an attorney who brings an action is authorized to do so by the plaintiff can only be overcome by clear and satisfactory evidence.

Appeal from Potoshiek District Court.

FRIDAY, APRIL 22.

ACTION in equity to set aside a judgment and enjoin an execution sale. The judgment upon which the execution issued was rendered in defendant Cox's favor, upon a counterclaim set up in an action brought ostensibly by the present plaintiff against Cox. The plaintiff avers, however, that the action was not in fact brought by him. The attorney who acted ostensibly for the plaintiff in bringing the action was one Foster, but the plaintiff avers that Foster was never authorized by him to bring the action, and that he had no knowledge that such action had been brought until long after

Wheeler v. Cox.

the rendition of the judgment against him upon the counter-claim, and about the time of the issuance of the execution.

He avers that there was at one time a mutual account between him and Cox, that certain items thereof were in dispute, but that they were finally settled by arbitration, and that Foster was so informed, but that he wrongfully and without the plaintiff's knowledge brought an action upon the plaintiff's account, and that Cox then set up his account against plaintiff by way of counter-claim, and succeeded in obtaining a judgment thereon, which is the judgment in question.

The defendant, Cox, denies that the action was brought without the plaintiff's authority and knowledge. There was a decree for the defendants. The plaintiff appeals.

Redman, Carr & Farmer, S. H. Fairall and J. T. Been,
for appellant.

Lewis & Clark, for appellee.

ADAMS, CH. J.—We may assume, in the absence of any averment or evidence to the contrary, that Foster was a practicing attorney of the court in which the action was brought. It is to be presumed, then, that he had authority to bring the action, and the presumption must prevail unless the evidence of a want of authority is clear and satisfactory. The records of a court, regular upon their face, have a large degree of sanctity attached to them, and are not to be lightly overcome. *Harshey v. Blackmarr*, 20 Iowa, 161. We have, then, to consider whether the evidence of a want of authority on the part of the attorney, Foster, is such that a presumption of authority arising from his relation to the court should be regarded as overcome.

The evidence of a want of authority to bring the action consists mainly of the testimony of the plaintiff himself. It appears, from his testimony, that there was a mutual account

Wheeler v. Cox.

between the plaintiff and Cox, and a dispute between them in regard to certain items. The plaintiff employed Foster to draw up the account in his favor from certain memoranda given him. The account then drawn up by Foster was retained by him, and an action brought upon it. The plaintiff had knowledge that the account was retained by Foster, but he testified that he did not authorize him to bring an action upon it, but, on the contrary, that he expressly told him that he and Cox had settled. If this testimony stood alone we might regard it as sufficient to overcome the presumption of authority on the part of Foster. But Mr. M. E. Cutts, who was employed as an attorney by Cox to defend in the action, and drew and filed the counter-claim upon which the judgment was rendered in Cox's favor, testifies that he had negotiations with the plaintiff in regard to the continuance of the action, and, also, in regard to its settlement. It is true he says that it is possible that his talk with the plaintiff might have been before the action was really brought, but it is evident from an examination of his testimony that such is not his recollection. Besides, he is corroborated by Cox, who testifies that the plaintiff was in attendance at a term of court in which the action was pending, and was in the court-room when the case was called.

The presumption of authority on the part of Foster is not, in our opinion, overcome.

AFFIRMED.

MOORE V. ORMAN ET AL.

55 39
98 386

1. **Conveyance: WHEN VOID: HUSBAND AND WIFE.** Evidence considered under which it was held that a conveyance of land by a husband to his wife was voluntary and void as against existing creditors of the husband.

Appeal from Madison Circuit Court.

FRIDAY, APRIL 22.

ACTION in equity. Decree for the defendants, and plaintiff appeals.

Mott & Steele, for appellant.

Gilpin & Gilpin, for appellees.

SEEVERS, J.—The defendants, Sarah and John Orman, were married in 1835. About that time Mrs. Orman received from a brother and her father's estate about five or six hundred dollars, which she placed in her husband's possession. With said money, or a part of it, he purchased of the General Government certain land in Muscatine county, Iowa, and took the title thereto in his own name. This land was sold, and other land purchased in Madison county, the title to which was also vested in said John. This land was afterward sold for five thousand dollars, and two hundred and forty acres of other land purchased, the title to which was placed in the name of said John. This last real estate was purchased about twelve years prior to the trial in the Circuit Court. It had all been sold on the 2d day of February, 1878, except one hundred and thirty-eight acres, which the said John, on said day, conveyed to his wife, the defendant Sarah.

In 1877, John Orman executed his promissory note to Hamler, as surety for Swaney. This note was assigned to

1. CONVEY-
ANCE: when
void: hus-
band and
wife.

Moore v. Orman.

Vail, who obtained a judgment thereon, April 2, 1878. This judgment is the property of the plaintiff, and he seeks to subject the real estate last aforesaid to the payment thereof. Said real estate was worth, at the time it was conveyed to Mrs. Orman, from \$3,000 to \$4,000. When Mrs. Orman let her husband have said money, in 1835, no note, or memorandum, or charge of any kind was exacted or made. The evidence does not show that either John Orman or his wife at that time expected or made any provision for the repayment of said money.

Mrs. Orman paid nothing at the time the conveyance was made to her; the only consideration therefor being the money she let her husband have in 1835, except that she assumed the payment of a certain mortgage thereon, and also was to pay a certain chattel mortgage on personal property sold her by her husband.

Mrs. Orman testified she took the conveyance, or, at least, one reason for her so doing was, to prevent persons from obtaining it from her husband for an inadequate consideration.

For some time prior to the conveyance, Mr. Orman's habits had been bad, and, while under the influence of liquor, he had allowed himself to be imposed upon by others to his pecuniary disadvantage. We think this clearly appears from the evidence of Mrs. Orman, and that to provide herself a home she obtained the conveyance.

We fail to discover from the evidence that she or her husband made the conveyance because of, or in payment of, said money obtained by him of her in 1835. The controlling reason, we think, was to prevent Mr. Orman from squandering his estate. The indebtedness, or supposed indebtedness, which originated at or about the time of the marriage, was not, in our opinion, the inducing cause of the conveyance. If it was, we do not think it can be permitted to stand as against existing creditors. Mrs. Orman was, in no just sense, a creditor of her husband. She, in fact, gave him the money

Bettis v. Bristol.

and had no intention of ever asking him to repay it. Nor did she ever do so. While no fraud, in fact, is imputed to either of these parties, and in one view what they did cannot be condemned, yet the law cannot sustain a conveyance made without a valuable consideration, if prejudicial to creditors. The Circuit Court is directed to render a decree in accordance with this opinion.

REVERSED.

BETTIS v. BRISTOL.

1. **Promissory Note: INDORSEMENT BY AGENT.** Where an indorsement of a promissory note is made by an agent of the payee it is not essential to its validity that the agent's authority should appear upon the note.

Appeal from Tama District Court.

FRIDAY, APRIL 22.

ACTION at law upon a promissory note. The cause was tried to the court without a jury, and judgment rendered for plaintiff. Defendant appeals.

Mills & Guernsey, for appellant.

Ebersole & Willett and *F. A. Simmons*, for appellee.

BECK, J.—I. The case was tried in the court below upon an agreed statement of facts, from which it appears that the note in suit was executed by defendant, for goods bought of Willoughby, Clark & Co., and was made payable to their order; that before maturity of the paper it was purchased in good faith, and for value, by plaintiff, and was delivered to him without indorsement; that soon after it was purchased and delivered, and before it matured, the payees wrote a letter to plaintiff, authorizing him to indorse the note in their names,

whereupon he executed the power thus conferred on him, by making a blank indorsement in this form: "Willoughby Clark & Co., by Wm. Bettis;" that subsequently, and before, the maturity of the note, one to whom defendant had assigned his property for the benefit of his creditors made payment of the note to the payees, Willoughby, Clark & Co.; that the transactions all occurred in the State of Illinois, and that defendant had no notice of the transfer of the note, and plaintiff had no knowledge of the payment to the payees, both of the parties acting in respect to the note in good faith.

II. The defendant insists that the payment of the note to the payees, under the circumstances just stated, discharged him of liability. He bases his position upon the 1. PROMISSORY note: indorsement by agent. ground that the indorsement is not sufficient in that it was not made by the payees themselves.

The statute of Illinois requires that *indorsements* of negotiable paper shall be made thereon "under the hand" of the indorser. A like rule prevails in this State. *Yunker v. Martin*, 18 Iowa, 143; *Franklin v. Twogood*, Id., 515.

It is insisted that not only the *indorsement* must be made upon the paper, but, when done by an agent of the indorser, his authority must also appear thereon. We know of no principle of law or decision of the courts supporting this position.

An indorsement may be made by an agent whose authority is conferred by parol. It would be impossible to show his authority upon the note or bill. And when an agency is created by a general power of attorney or written appointment, it would be equally impossible to show it by indorsement upon the commercial paper which the agent may be required to transfer. Counsel for defendant cite the following cases upon this point: *Hilborn v. Artus*, 3 Scam., 344; *Roosa v. Crist*, 17 Ill., 450; *Wilder v. DeWolf*, 24 Ill., 190; *Fostier v. Darst*, 31 Ill., 212; *Ryan v. May*, 14 Ill., 49; *Badgley v. Votrain*, 68 Ill., 25.

These decisions fail to support counsel's position. They do

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not hold that an indorsement of commercial paper by an agent is not good unless it contains the appointment of the agent in writing.

No other question is discussed by counsel. The judgment of the District Court must be

AFFIRMED.

MCCORMICKS V. FULLER & WILLIAMS ET AL.

1. **Evidence: CONVERSATION THROUGH INTERPRETER: CONTRACT.** The testimony of a witness to a conversation between himself and another through an interpreter, by which a contract was made, is competent evidence to establish the contract.
2. —: **DECLARATIONS: VENDOR AND VENDEE.** The declarations of a vendor in possession of property to which he has parted with his right are not admissible in evidence to affect the rights of his vendee, against whom no charge of fraud is made.

56	43
112	713
56	43
1113	410

Appeal from Winneshiek Circuit Court.

FRIDAY, APRIL 22.

REFLEVIN for a harvester. There was a verdict and judgment for plaintiffs. Defendants appeal.

Brown & Wellington, for appellants.

Willett & Willett, for appellees.

BECK, J.—I. An opinion was filed in this case at the June term, 1880, reversing the judgment of the Circuit Court. Upon petition of plaintiff a rehearing was granted, and the cause has been again argued. The judgment was reversed for error in an instruction given to the jury, which was to the effect that if the jury found there was an agreement between plaintiffs and one under whom they claimed, by which plaintiffs could acquire the title, but no actual transfer had been made, the

McCormicks v. Fuller & Williams.

plaintiffs are entitled to recover. The instruction was incorrectly set out in the abstract. As given, it is to the effect that an absolute transfer of the property, not an agreement to transfer in the future, would entitle plaintiffs to recover. The instruction was corrected in an amended abstract, which escaped our attention at the time the opinion was prepared and filed.

II. The petition alleges that plaintiffs are the absolute owners of the property, and entitled to the possession thereof. The defendants, in their answer, aver that they are the owners of the harvester, and entitled to the possession under a chattel mortgage executed by Ole Oleson Haave, who was the owner and in the possession of the property. The plaintiffs supported their claim to the property by evidence tending to prove that they had sold the harvester to Haave with a warranty and an agreement that, if it did not comply with the terms of the warranty, plaintiffs would "take back" the machine. The harvester was defective and did not "work all right," and the plaintiffs, through their agent, "did take the machine back," upon the request of Haave, and left it in his possession to be taken care of for the plaintiffs. The defendant, after these transactions, induced Haave to execute to them a chattel mortgage upon the machine. At the time Haave informed defendants that the property was owned by plaintiffs, and did not belong to him. Defendants' evidence tended to contradict the testimony offered by plaintiffs, and to show that they had no notice that the harvester had been "taken back" by plaintiffs.

III. The court instructed the jury to the effect that if there had been an executed agreement under which the machine was "*taken back*" *i e*, the ownership was transferred to plaintiffs, of which defendants had notice when the mortgage to them was executed, they should find for plaintiffs. But if the jury should find that plaintiffs did not own the property when the mortgage to defendants was executed, or the defendants at the time had no notice of plaintiffs' claim, or the agree-

ment between plaintiff and Haave was to the effect that the machine should be returned to plaintiffs upon delivery to Haave of the notes given to plaintiffs for the property, which had not been done, then their verdict should be for defendant. These instructions are clearly correct. If there was an unconditional transfer of the property back to plaintiffs, of which defendants had notice, they are entitled to the property. This position needs for its support neither argument nor authorities. It is based upon elementary principles of the law. The instructions requested by defendants are substantially covered by those given; there was no error in refusing them.

IV. The agreement with Haave, under which the property was transferred to plaintiffs, was made by two agents of plaintiffs. Haave did not speak the English language, and the principal agent was unacquainted with the language spoken by Haave. The other agent spoke both languages, and acted as an interpreter in the negotiation between the principal agent and Haave. This agent was permitted, against defendants' objections, to testify as to the conversation, through the interpreter, between himself and Haave. Defendants' counsel insists that the agent did not understand Haave's words, and depended upon the interpreter in order to acquire a knowledge of their meaning, his evidence is mere hearsay. We think the objections not well taken. The evidence was intended to show a contract between plaintiffs and Haave, and the interpreter was chosen by the parties as a medium of communication through which both could speak. He was the agent of each, and his words were the language of the respective parties for whom he translated. Section 1, Phillipps on Evidence; Cowan & Hill's, and Edwards' Notes, 4 Am. Ed., p. 519.

Another reason supports the ruling of the court below. The contract is to be enforced according to the mutual understanding of its terms by the parties. The evidence of the witness shows plaintiffs' understanding of the contract. It was admissible on this ground: It is proper to say that the

 McCormicks v. Fuller & Williams.

statements of this witness accord with the testimony of Haave and the interpreter, as to the purport of the contract.

V. A witness of defendants was asked to state the conversation had with Haave, when he took the machine under the mortgage, which had been executed four or five days before. The defendants proposed to prove by this witness that Haave declared that no one had a claim upon the machine except defendants, and that the machine belonged to him. The evidence was rightly rejected. Declarations made by a party in possession of property, after he has parted with his right, are not admissible to affect one claiming under him. Section 1, Phillips on Evidence; Cowan & Hill's and Edwards' Notes, 4 Am. Ed., p. 322, *et seq.*

In *Blake v. Graves*, 18 Iowa, 812, the declarations of a vendor of personal property remaining in possession thereof, in an action brought by the vendee against attaching creditors of the vendor, was held admissible. Fraud was charged against the vendor and vendee. The declarations were held to be competent on the ground that the possession of the vendor after sale was, as to creditors, such evidence of conspiracy as to authorize the admission of the declarations, or was such connection with the property as to authorize the admission of the declarations a part of the *res gestae*. The decision is not applicable to the case before us for the reason that the plaintiffs, the vendees, are not charged with fraud.

In *Taylor v. Lusk*, 9 Iowa, 444, it is held that declarations of one in possession of personal property are admissible to explain the possession, whether it be under claim of ownership, or is held by one acting as an agent for the owner. The case has no application to the question before us. No other authorities are cited by appellants upon this point.

VI. It is urged that the evidence fails to support the verdict. It is conflicting, and it possibly may be claimed that, upon the point of notice to defendants of plaintiffs' acquisition of the property from Haave, the preponderance is

The Equitable Life Ins. Co. of Iowa v. Gleason.

for defendants. But it cannot be claimed that upon this or any other issue in the case there is such a failure of evidence as to authorize us to disturb the judgment. There must be, to authorize a reversal on the ground that the verdict is against the evidence, such failure of proof as to raise the presumption that the verdict was the result of passion or prejudice, and is not the result of an intelligent and honest exercise of the discretion of the jury. Nothing of the kind can be fairly claimed in this case.

We have considered all the questions discussed by counsel, and reach the conclusion that the judgment of the Circuit Court ought to be

AFFIRMED.

56	47
106	521

THE EQUITABLE LIFE INS. CO. OF IOWA V. GLEASON ET AL.

1. **Promissory Note: PLACE OF PAYMENT: CONSTRUCTION.** Where a promissory note was made payable at the office of the payee, the Equitable Life Insurance Company of Iowa, and the heading of the note was as follows: "Office of Equitable Life Insurance Company, Des Moines, Iowa," it was held that the note, taken as a whole, showed that it was payable at Des Moines.
2. **Practice: FORECLOSURE OF MORTGAGE: PLACE OF BRINGING SUIT.** Section 2178 of the Code, providing that mortgages may be foreclosed in the county where the property is situated, is permissive only; an action to recover on a note, and to foreclose a mortgage securing it, may be brought in the county where the note is made payable, though other than that in which the mortgaged property is situated, and this although the mortgage was executed while the Revision was in force, which required the foreclosure to be made in the county where the land was situated, the change in the statute being one which does not substantially affect the rights of the parties.

Appeal from Polk Circuit Court.

FRIDAY, APRIL 22.

ACTION to foreclose a mortgage given to secure a promissory note. The land mortgaged is situated in Ringgold coun-

The Equitable Life Ins. Co. of Iowa v. Gleason.

ty. Service was made by publication. Afterwards the defendants appeared and moved for a change of place of trial to Ringgold county, on the ground that the land mortgaged was situated in that county. The court sustained the motion and the plaintiff appeals.

Holmes & Nottingham, for appellant.

William Kennedy, for appellees.

ADAMS, CH. J.—The action was brought in Polk county upon the theory that the note was made payable in Polk county. Whether it was made payable in that county is one of the questions in dispute. The 1. PROMIS-
SORY note:
place of
payment:
construction. note, by its terms, was made payable to the order of the Equitable Life Insurance Company of Iowa, "at its office." There is no averment that the office of the company is in Polk county, but we find upon the note, preceding the date, the following words: "Office of Equitable Life Insurance Company, Des Moines, Iowa." These words, we think, must be taken to be the words of the maker of the note, and show that the office of the company is at Des Moines, and we judicially take notice that Des Moines is in Polk county.

It is insisted, however, by the defendants, that it only appears that the office of the Equitable Life Insurance Company is at Des Moines, whereas the note is made payable at the office of the Equitable Life Insurance Company of Iowa.

While the name "Equitable Life Insurance Company" is not identical with "Equitable Life Insurance Company of Iowa," we can but think, from the way the two names are used in the same instrument, that they were intended to denote the same company.

Having reached the conclusion that the note is made payable in Polk county, we have to determine whether that fact justified bringing the action in that county.

In support of the view that it did, the plaintiff relies upon § 2581 of the Code, which provides that "when, by its

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terms, a written contract is to be performed at any particular place, action for the breach thereof may be brought in the county wherein such place is situated."

The contract in this case was the note, and the performance called for was payment. As payment was to be made in Polk county, the contract was to be performed in Polk county. It is abundantly evident that the action might be brought in Polk county, unless there is some other provision of law which restricted the plaintiff to some other county. The defendants contend that there is a provision which restricted the plaintiff to Ringgold county, the county in which the land is situated. The provision relied upon as constituting such restriction is § 2178 of the Code, which provides that "an action for the foreclosure of a mortgage of real property may be brought in the county in which the property is situated."

2. PRACTICE :
foreclosure of
mortgage :
place of
bringing suit.

* * *

The plaintiff denies that this provision restricts the bringing of the action to the county in which the property is situated, but contends that it only *permits* it to be brought there. In our opinion the plaintiff's position is well taken. To give the provision the force of a restriction it would be necessary to read the word "may" as *must*. Now the general rule in the interpretation of statutes is that words of common use are to be taken in their natural, plain and ordinary signification. *Schreiber v. Wood*, 5 Blatchford, 215; *Quigley v. Gorham*, 5 Cal., 418; *Perkinson v. State*, 4 Md., 184. We see nothing in the interpretation of the statute in question which calls for any deviation from this rule. On the other hand it is to be observed that in the corresponding provision in the Revision the word *must* was used. § 2795. The change made in the enactment of the Code evinces very clearly a change in the legislative intent.

Again, it would hardly be contended that under the Code an action to foreclose a mortgage might not be brought in the county where the mortgagor resides, even though the

land were situated in a different county. It was so held under a similar statute (Code of 1851), in *Cole v. Conner*, 10 Iowa, 299. It was judicially determined in that case that the word "may," as used in that statute, did not have the force of *must*. But it is said that, even under that decision, an action is restricted to the county of the property, where the action is merely *in rem*, and that such is the character of the action in the case at bar. But we think that such is not the character of the action.

The petition shows that Peter Gleason was the maker of the note. The petition prays for a personal judgment against him; that the property be sold upon a special execution, and that the plaintiff may have a general execution for any balance that may remain unpaid. The action, then, so far as the petition shows, was not merely an action *in rem*. It is true service was made by publication. But this, it appears, was a mere blunder, because it is shown in the defendants' motion that they were residents of Iowa, and it follows that they could and should have been brought in by personal service. If they had been so brought in there could have been no pretense that the action was merely *in rem*. But the case is not different, for the moment the defendants appeared it would have been supererogatory to have served them with notice. No one would claim that, after appearance, service of notice was necessary to entitle the plaintiff to a personal judgment, either in that court or some other.

But it is insisted by the defendants that if it be conceded that the provision of the Code is permissive and not restrictive, still the motion for a change of place of trial was properly granted, because the mortgage was executed under the Revision, and the provision of the Revision was certainly restrictive.

It appears, it is true, that the mortgage was executed under the Revision. We have, then, the question whether the provision of the Revision must be held to govern.

The rule, as stated in *Jones on Mortgages*, § 1321, is as

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follows: "The law in force when the mortgage was executed must be followed in foreclosing it, though there be a change in the meantime. The remedy so provided becomes a part of the contract, of the parties, and any change by statute substantially affecting it, to the injury of the mortgagee, is held to be a law impairing the obligation of a contract, within the meaning of the constitution of the United States."

The defendants contend that this rule is correct, and as applicable to the mortgagor as to the mortgagee.

If we should concede this to be so, we should still have to determine whether the change was one which substantially affected the remedy to the injury of the mortgagor.

Before the change the maker of the note could have been sued upon the note in Polk county. The effect of the change was (if it is not obnoxious to the objection urged) to allow the plaintiff to have a decree of foreclosure of the mortgage in the same action. We cannot think that such a change, if allowed, would result in a substantial injury to the mortgagor. Hence, it appears to us that the provision of the Code must be held to govern. As that appears to us to allow the action to be brought where the written contract sued on was by its terms to be performed, we have to say that we think that the court below erred in sustaining the defendants' motion.

REVERSED.

Meyers v. Funk.

MEYERS V. FUNK ET AL.

1. **Contract:** FOR SALE OF PATENT RIGHT: FRAUDULENT REPRESENTATIONS. The plaintiff conveyed lands to the defendant in consideration of the assignment to him of an interest in a certain patent which the defendant represented had been issued to him on an article of his invention, but which, in fact, had not at the time been issued, and when a patent was afterward granted on the invention it did not cover all the points claimed by the defendant: *Held* that the plaintiff was entitled to a rescission of the contract.

Appeal from Adair Circuit Court.

FRIDAY, APRIL 22.

IN June, 1868, the plaintiff, being the owner of 680 acres of land in Adair county, exchanged the same with the defendant E. H. Funk, for an assignment of an interest in letters patent upon "E. H. Funk's Flora Temple Churn," which letters patent were said to have been obtained in 1866. The territory assigned to the plaintiff embraced the State of Iowa, and certain counties in the State of Missouri. No other consideration passed between the parties. The land was owned by the plaintiff in fee, and he executed and delivered to said Funk a deed thereto, which conveyed a good title. At the same time the defendant executed an instrument which purported to convey the said interest in the patent right.

In July, 1872, this action was commenced, by which it is sought to set aside the conveyance of the land, and rescind the contract, on the ground that said E. H. Funk did not have letters patent upon said churn, issued in 1866, nor at the time said exchange of property was made, and that the conveyance of said land was, therefore, wholly without consideration and void, and upon the further ground that said Funk, to induce the plaintiff to make such exchange, falsely and fraudulently represented to plaintiff that he did have said patent. The defendant E. H. Funk answered, denying the alleged fraud-

Meyers v. Funk.

ulent representations, and denying that he represented to the plaintiff, at the time of the exchange of property, that he had obtained letters patent upon said churn. He further alleged in substance that in 1866 he invented a certain improvement in churn dashers, and he filed a caveat in the patent office of the United States, claiming said invention as his own; that on the 15th day of September, 1868, he obtained letters patent upon said invention, and that between the date of filing said caveat and the issuance of said patent he had not parted with his interest in said invention in the State of Iowa, and said counties in Missouri, excepting by said assignment to the plaintiff; that plaintiff did not rely on any representations made by the defendant, but that plaintiff purchased said territory after testing and using one of said churns, and in reliance upon his own judgment and his personal knowledge of its practical working. It is further averred that the plaintiff and his sons have been in the actual possession of the said territory, and the patent right of the Flora Temple Churn, as conveyed to them, and has never before the commencement of the suit offered to rescind said contract; that it was defendant's intention to transfer and assign to plaintiff all his right to the improvement in churn dashers as afterwards patented to him, and he averred a readiness and willingness to make such conveyance, and with his answer brought into court and filed a formal conveyance of the said territory to the plaintiff under said patent of September 15th, 1868.

Lewis S. Funk intervened as a party defendant and averred that in February, 1872, he purchased of said E. H. Funk 240 acres of said land, and took his conveyance thereof; that he purchased the same in good faith, and for a valuable consideration, and without any notice of fraud or want of consideration in the conveyance from plaintiff to said E. H. Funk.

The plaintiff answered the petition of intervention by charging notice upon Lewis S. Funk, and alleged that he was a party to the fraud, and entered into collusion with E. H.

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Funk, to cheat and defraud plaintiff, and well knew that E. H. Funk had no patent for said churn.

There was a trial upon written evidence, and a decree was entered rescinding the contract of exchange as prayed in the petition. Defendants appeal.

Geo. L. Gow and John Leonard, for appellants.

H. Grace, Barcroft, Given & McCaughan and McCaughan & Dabney, for appellee.

ROTHROCK, J.—I. There is a conflict in the evidence as to what oral representations were made by the defendant, E. H. Funk, during the negotiations for the exchange of property, and at the time the conveyances were delivered. We do not think it is necessary to give the evidence in detail. The question cannot be controlled by the number of witnesses which each party has produced and examined. The written assignment of the territory made by the defendant to the plaintiff recites that the “Flora Temple Churn” was patented in April, 1866. It purports to convey an interest in an invention which was then patented. It is conceded that the defendant exhibited a churn, at the time and before the trade was consummated, upon which was inscribed certain letters to the effect that it was patented, with the date of patent. With these proofs it is useless to argue that the defendant did not represent that the churn was patented in April, 1866. The writing, and the inscription on the churn, were standing representations to that effect, which cannot be gainsaid nor denied. That the defendant, in his answer and in his evidence, admits that the recital in the assignment is not true, and that he knew it was false, when he executed and delivered it, must be conceded, for the evidence shows without conflict that he did not even make application for a patent, until after the assignment to the plaintiff.

1. CONTRACT:
for sale of
patent right:
fraudulent
representa-
tions.

Meyers v. Funk.

It is contended by counsel for appellants that although the defendant had not procured a patent when he sold the territory to the plaintiff, yet that when he did procure it, the right of the plaintiff in the territory purchased by him vested and took effect by relation. But the proofs in the case show that the patent which was afterwards applied for and obtained did not cover all the improvements, or all of the invention claimed by the defendant when he made the assignment to the plaintiff. When he made his application for a patent for the invention claimed, the commissioner of patents decided that he was not entitled to letters patent for all that was claimed, because certain parts of it were covered by patents to others. Defendant then modified the claim first made, and took a patent in accordance with the decision of the commissioner. How material this modification was we need not inquire. We think it not too stringent a rule to hold that one who purchases a patent right which does not sell on its own merit, but requires the services of travelling salesmen, is entitled to the very invention and patent which he purchases, and nothing less.

It is said that the plaintiff should have promptly offered to rescind the contract, and that by reason of the delay he is not entitled to relief. But the evidence shows that he did not ascertain until a short time before he brought this suit that the defendant did not have a patent when he made the assignment. Besides, there really was no rescission necessary upon the part of the plaintiff. By the assignment to him he received absolutely nothing which a rescission would require him to restore to the defendant.

It is said that the court below had no jurisdiction to try the validity of the patent obtained by E. H. Funk in September, 1868; that the federal courts alone have jurisdiction of all actions in which the validity or force of letters patent is involved.

But the ready answer to this is that the validity of the patent which defendant obtained is not involved in the ac-

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tion. The issue presented here is, did the defendant falsely represent that he had a patent dated in April, 1866, and did he by means of such representation obtain a conveyance of the plaintiff's land without any consideration?

The evidence shows beyond question that Lewis S. Funk is not an innocent purchaser of the land claimed by him. He was present when the negotiations for the exchange of property were made, and at its consummation. His name appears as an attesting witness to the assignment of the interest in the pretended patent. He took an active part in making the trade, and joined in the representations made by the defendant, who was his brother, and we think the evidence fairly shows that he represented that he had assisted his brother in obtaining a patent.

In our opinion the decree of the Circuit Court should be

AFFIRMED.

56	60
79	411
56	56
83	231

GUNDERSON V. RICHARDSON.

I. Fraud: CONTRACT MADE ON SUNDAY. An action will not lie to recover damages for fraudulent representations made as inducement to a contract entered into on Sunday.

Appeal from Kossuth District Court.

FRIDAY, APRIL 22.

THE following is a copy of the petition in this case: "For cause of action herein, plaintiff says: That on or about the first day of June, 1878, the plaintiff traded a pair of large work horses to the defendant for a pair of smaller horses and ninety dollars cash; that at and before said trade, and as an inducement to plaintiff to make said trade with defendant, the said defendant, with the intent and purpose to cheat and defraud plaintiff, did willfully, falsely, and fraudulently state

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and represent that one of his said horses, to-wit, the dark bay, medium sized horse, was sound and all right in every way, except he had the horse distemper, but did not have the glanders, was getting over it and would be all right in a short time; that plaintiff, believing and relying upon the statements and representations so made by defendant, was thereby induced to trade for and take said horse as aforesaid; that in truth and in fact said horse did not have the disease commonly known as horse distemper, but did have the disease known as the glanders, nasal gleet, or farcy, which disease said horse had had for a long time and was of no value whatever, all of which facts were well known to defendant; that if the said horse had in fact been as defendant represented, he would have been worth one hundred dollars; that plaintiff took said horse to his home in Winnebago county, where he kept him with his other horse; that said diseased horse communicated said disease to plaintiff's other one, a black mare, that died with said disease about the first of September, 1878; that said last named mare was of the actual value of fifty dollars; that plaintiff, after he discovered that said horse so obtained from defendant had the glanders, returned said horse to defendant about the first of October, 1878, and tendered said animal to said defendant; that plaintiff spent a large amount of time in nursing and doctoring said horse, and that plaintiff's time so spent was about twenty days, which time was reasonably worth one dollar per day; that plaintiff expended two dollars for medicine for said last mentioned horse; that the reasonable expense of keeping said horse from the time he got the same from defendant up to the time plaintiff ascertained that said horse had the glanders, which was ninety days, was twenty-two dollars; that plaintiff has sustained damages by the acts of defendant, as aforesaid, in the full sum of one hundred and ninety-four dollars and fifty cents; wherefore plaintiff demands judgment against the defendant for one hundred and ninety-four and 50-100

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dollars real damages, and three hundred and five and 50-100 dollars exemplary damages, and costs of this action."

One count of the answer was as follows: "Defendant further answering the plaintiff's petition says that said horse trade was entered into and consummated on the second day of June, 1878, which was the first day of the week, commonly called Sabbath."

There was a demurrer to said count upon the following grounds:

"1st. The facts set forth in said count do not constitute a defense to the action for the reason that plaintiff is not trying to enforce a contract.

"2d. Because this action is based upon fraud practiced by the defendant upon the plaintiff in the sale of personal property."

The demurrer was sustained. Defendant excepted and appeals, and assigns the sustaining of the demurrer as error.

George E. Clarke, for appellant.

J. H. Hawkins, for appellee.

ROTHROCK, J.—It is well settled that when parties enter into a contract on Sunday, and either of them undertakes to enforce it by action, or to recover damages growing out of the illegal transaction, the law will leave the parties where it finds them, and no recovery will be allowed. The law leaves the parties to suffer the consequences of their illegal acts. *Pike v. King*, 16 Iowa, 49; *Kinney v. McDermot*, 55 Iowa, 674; *Smith v. Bean*, 15 N. H., 577. In the last cited case it is said that "no action will lie for fraud or breach of warranty upon a Sunday contract."

Counsel for appellee contends, however, that this action is not for fraud or breach of warranty, but that it is an action for damages against the defendant for knowingly offering to trade a horse affected with the glanders, and that such act

1. FRAUD:
contract
made on
sunday.

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being unlawful and a crime under § 4056 of the Code the defendant cannot escape liability by asserting that his unlawful and criminal act was committed on Sunday.

We have set out the petition, and the count of the answer demurred to, because of this line of argument by defendant's counsel. It appears to us that, by all the allegations of the petition, the plaintiff bases his right to recover by reason of the contract for the exchange of the horses. To support these allegations it is absolutely essential to show that the exchange was actually made. He could establish his damages in no other way. It was, therefore, incumbent on him to show the contract as he alleged it to be. This he could not do, for the law leaves the parties to such contracts where they place themselves. In other words, as appears from the petition, both these parties were active participants in violating the law by entering into a contract on Sunday. The plaintiff claims that in making the contract defendant defrauded him to his damage. The law will not afford him redress, and it will not avail the plaintiff to assert that the defendant, in making the Sunday contract, also violated another provision of the criminal code.

The case, it appears to us, is essentially different from the case of one travelling on Sunday and being assaulted by another or injured by a defect in the highway. In the latter class of cases the plaintiff does not seek to enforce an illegal contract, or to recover damages growing out of such contract to which he was an active party; nor, as is said in *Schmid v. Humphrey*, 48 Iowa, 652, "is he seeking to enforce any right obtained by the breach of any law."

We think the demurrer to the answer should have been overruled.

REVERSED.

PERRY ET AL V. DRURY ET AL.

1. **Will: TRUST CREATED BY: BOND REQUIRED OF TRUSTEES.** Persons to whom personal property is bequeathed by will, and who are charged with certain trust duties in respect thereto, are properly legatees, and not trustees within the meaning of section 2350 of the Code, requiring trustees under a will to give bonds. Such provision applies only to those who take property to hold for a determinate period, at the expiration of which it is to be transferred to the beneficiaries, and during the continuance of which period the estate remains unsettled and under the supervision of the probate court. *SEEVERS, J., dissenting.*
2. **Circuit Court: AS A COURT OF PROBATE: EQUITY POWERS.** The Circuit Court as a court of probate is invested by the statute with no general chancery powers.

Appeal from Scott Circuit Court.

FRIDAY, APRIL 22.

THE plaintiffs, who are legatees under the will of Mrs. Clarissa C. Cook, deceased, filed their petition in the Circuit Court of Scott county, sitting as a court of probate, asking that the executors of the estate be required to pay over the legacies to the plaintiffs without their first giving bonds as trustees under the will. The prayer of the petition was denied and an order was entered requiring the plaintiffs to execute bonds as prescribed by Code, § 2350, before the legacies shall be paid to them respectively. From this order William Stevens Perry, Bishop of Iowa, "The Trustees for Funds and Donations for the Diocese of Iowa," and the "Board of Missions of the Diocese of Iowa," appealed.

George J. Boal and J. Howard Henry, for appellants.

Cook & Dodge, for appellees.

BECK, J.—I. Mrs. Clarissa C. Cook, deceased, by her last will and testament made certain bequests in the following language:

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"Fourth. I give and devise to the 'Trustees of Funds and Donations for the Diocese of Iowa' the sum of twenty thousand dollars, in trust, for the following purposes: I direct the said sum of money to be safely and securely invested, and that each year or half year, as the interest may be collected, the interest shall be paid to the destitute parishes in the Diocese of Iowa. In the event that the present Diocese of Iowa shall be divided into two or more dioceses, then I direct that the said fund may be justly and equitably apportioned among said dioceses. And I direct and request that the Bishop and the standing committee of the diocese shall, from time to time, determine which parishes are most entitled to the benefit of the fund; my wish being as far as possible to relieve the weaker parishes of the diocese. (Reduced to \$10,000 by item sixth of codicil.)

"Fifth. I give and devise to the 'Trustees of Funds and Donations for the Diocese of Iowa,' the sum of ten thousand dollars, in trust, for the following purposes: I direct and request that the said principal sum shall be safely and securely invested at as high a rate of interest as is consistent with law, and shall provide for the payment of the interest semi-annually if possible; and that said trustees of the said fund shall pay semi-annually to the indigent, disabled clergymen of the Diocese of Iowa, and to the indigent widows of deceased clergymen of said Diocese, the interest on the said fund, so distributing the same as to afford relief to the most needy.

"Seventh. I give and devise to the 'Board of Missions of the Diocese of Iowa' the sum of ten thousand dollars; in trust, however, for the following purposes: The said sum shall be invested by the board, and the interest accruing therefrom each year shall be applied by the said board in the support of Missions in the Diocese of Iowa."

"Forty-eighth. I give and devise to the Bishop of the Diocese of Iowa, who may be elected to succeed the late Bishop Lee, and to his successors in office, the sum of ten

thousand dollars, in trust, for the uses and purposes following: I direct that the said sum shall be securely invested at as large a rate of interest as can be obtained, consistent with the law, and the interest accruing therefrom shall annually, or semi-annually, as the same may be collected, be applied and appropriated by the said bishop and his successors in office to the support of the weak and destitute parishes of the Protestant Episcopal Church in the Diocese of Iowa. As I have heretofore made provision for the parishes in Scott county, I direct that this fund shall only be used for weak parishes outside of the county of Scott, in said diocese; the said money to be so appropriated each year as the bishop may, in his judgment, consider for the best interest of the parishes to which the money may be applied.

“But in no event shall more than five hundred dollars be appropriated to any one parish in any one year. If the present Diocese of Iowa should be divided into two or more dioceses, then it is my will, and I direct, that the said fund above provided shall be owned by and used in the diocese in which the city of Davenport, in county of Scott, may be located.

“*Fiftieth.* All the rest, residue and remainder of my estate of every name and kind, whether from my late husband's estate or otherwise, after the payment of the above legacies, I direct shall be sold and converted into money, and shall be divided as follows, to-wit: In two equal parts; and I give and devise one part, that is, one-half of the same, to the Trustees of Clarissa C. Cook's ‘Home for the Friendless;’ or if the same shall have become incorporated, then I direct that the same shall be paid to the proper officers of said corporation, to be used and employed as the fund heretofore provided for said home, and as more particularly specified in article eleven of this will. And I give and devise the other half of the said sum to the ‘Trustees of Funds and Donations of the Diocese of Iowa,’ to be used and employed for indigent, disabled clergymen, and widows of deceased clergymen in the

Diocese of Iowa, as particularly specified in article 5th of this will."

It will be observed that under these provisions of the will "The Trustees of Funds and Donations for the Diocese of Iowa," "The Board of Missions of the Diocese of Iowa," and the "Bishop of the Diocese of Iowa," are legatees under the will, and the "Trustees of Funds and Donations of the Diocese of Iowa" are also named as the residuary legatees of all the property of the deceased.

The relief sought by the plaintiffs in the petition is that an order be entered by the court requiring the executors of the estate to pay the legacies bequeathed to plaintiffs, the legacies named in the portion of the will above set out, without demanding or receiving from them bonds as trustees under the will.

II. At the hearing of plaintiffs' petition the will of Mrs. Cook was read in evidence, and the following facts were admitted by the parties:

"*First.* That the religious organization known as the Diocese of Iowa is composed of William Stevens Perry, Bishop, the clergymen of the Protestant Episcopal Church located and residing in the State of Iowa, and of the parishes in communion with said Protestant Episcopal Church in the various parts of said State of Iowa; that said Diocese of Iowa is not incorporated, but it acts through its Annual Convention, which is composed of the bishop and clergy of said diocese, and lay delegates from the several parishes.

"*Second.* That the 'Trustees of Funds and Donations of the Diocese of Iowa' is composed of the bishop and standing committee of said diocese, and is incorporated under the laws of Iowa, for the purpose of holding for said diocese any property given or acquired for objects connected with the Protestant Episcopal Church in said diocese, with power to accept gifts of real or personal property, and to invest and apply the same for the benefit of the clergy and parishes connected with said Diocese of Iowa and said diocese; that

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said corporation is composed of persons elected by the Annual Convention to serve in that capacity until the next Annual Convention is held, and reports annually, to the convention, the condition of property in its hands.

“*Third.* That the said ‘Board of Missions’ of the Diocese of Iowa is not incorporated, but is in the nature of a standing committee of the convention of the said Diocese of Iowa, its members being elected by each Annual Convention to serve until the next succeeding Annual Convention is held, and is required to report annually to said convention; this is in pursuance of the constitution and canons of the said diocese.

“*Fourth.* That the standing committee of the diocese consists of three presbyters and three laymen communicants of the church, who are elected by ballot at each Annual Convention; and they are required to report annually to the convention a correct account of their acts.

“*Fifth.* That William Stevens Perry, as Bishop of Iowa, is *ex-officio* the president of said ‘Trustees of Funds and Donations’ and of said ‘Board of Missions’ according to the articles of incorporation of said trustees and the constitution and canons of said Diocese of Iowa, but the office of bishop is not incorporated.

“*Sixth.* That the constitution and canons of the diocese were enacted by the convention of the diocese, and such convention is authority for all the laws enacted in the diocese.

“*Seventh.* That the estate is ample to meet all the bequests and devises under the will, with a considerable residue.”

No other evidence was offered or introduced upon the hearing.

The Circuit Court denied the prayer of the petition and ordered that before the payment of the legacies the respective legatees should severally execute bonds as required of

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trustees appointed by will under Code, § 2350, in an amount equal to the respective legacies.

III. The question for determination in the case is this: Do the statutes of the State require the respective legatees to execute bonds for the faithful appropriation and care of the funds bequeathed to each?

1. WILL: trust created by: bond required of trustees.

Counsel for the defendants do not deny that a court of chancery in the management of the trust funds might have exempted the legatees from giving bonds before the enactment of § 2350 of the Code, but maintain that under the statute the Circuit Court has no authority so to do. Counsel for the plaintiffs insist that this statute has no application to the legatees who are parties to the proceedings, for the reason that they are not such trustees as are contemplated therein. This statement sufficiently discloses the contention between the parties, which we shall now proceed to consider.

Code, § 2350, is in the following language: "Trustees appointed by will or by the court must qualify and give bonds the same as executors, and shall be subject to control or removal in the same manner."

Section 2312 provides as follows: "The Circuit Court of each county shall have original and exclusive jurisdiction of the probate of wills, and the appointment of such executors, administrators or trustees as may be required to carry the same into effect; of the settlement of the estates of deceased persons and of the persons and estates of minors, insane persons and others requiring guardianship, including applications for the sale of real property belonging to any such estates, except as prescribed in chapters one, two and three of title fifteen."

These are the only statutes applicable to the question before us.

Two classes of persons may take personal property under a will. The first class includes those who take property to hold for a determinate period, and at the expiration thereof

it is to be transferred to the beneficiaries under the will. Such persons are in no sense legatees; they are merely trustees.

The other class includes those to whom personal property is bequeathed and who are charged with certain trust duties in respect thereto. They are, in fact, legatees charged with executing the benevolent or other purposes of the testator. Considered in their relations to the testator and the will they are legatees. Regarded in their relations to the beneficiaries of the property which they take under the will, they are charged with trust duties. But they cannot be called trustees without words of qualification. They take the property as legatees, and in their relations to the will and in the settlement of the estate are known and designated as such.

The plaintiffs belong to the second class above designated, and in the proceedings relating to the estate in the probate court are to be regarded and designated as legatees, and not as trustees. They do not, therefore, come under the provisions of Code, § 2350.

IV. This construction of the statute is supported by various considerations, some of which we shall proceed to state.

It will be remembered that the proceedings now under review were pending in the court of probate. Its jurisdiction and powers are prescribed in Code, § 2312, above quoted. Its jurisdiction extends to "the probate of wills, and the appointment of such executors, administrators or trustees as may be required to carry the same into effect," and "to the settlement of the estates of deceased persons." The will in the case before us, as to the legacies in question, is "carried into effect" by the payment of the funds bequeathed to the respective legatees, and, when all the legatees have been so paid, the estate is regarded as settled. If a legatee is to receive funds through a trustee mentioned in the will, the final settlement of the estate cannot be made until he is paid by the trustee. But when, as in the case of plaintiffs, funds are bequeathed to be used according to the directions of the testator, the estate, as to such legacies, is settled when the lega-

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tees receive the funds bequeathed. In the case before us, the parishes, clergymen, and others, who are, in the distribution of the income of the funds, to receive benefits therefrom, are not regarded as legatees, but, rather, beneficiaries of the funds; but this does not require us to consider them as legatees.

If the position of the defendant's counsel is correct, when would an estate of this kind be settled? The plaintiffs, as legatees, and their successors, are to hold the funds bequeathed in perpetuity, the income thereof, only, being appropriated.

How long shall a bond, to be required from a legatee in this case, run? If perpetually, who would charge his estate with such an obligation, or of what value might such security finally become? If the bonds are to be renewed from time to time, under what authority of the statute can this be done? If they may be so renewed, or, if they bind the sureties and their heirs as long as their families exist, when may the estate before us be settled? Yet the probate court, having jurisdiction to settle estates, ought to be able so to do in all cases. But in this case there never could be a settlement if the view of the defendant's counsel be correct.

These questions and suggestions present insuperable objections to the decision of the court below. It surely was not the intention of the legislature, as expressed in the statute quoted, to so provide that the settlement of an estate should be interminable, and that a case may be pending in the probate court without any hope or expectation of the parties interested that it will have an end.

Under our view of the law, the beneficiaries of the bequests to plaintiffs are not left without relief, or a court to which they may apply for an appropriate remedy, should the legatees fail, through any cause, to administer properly the trusts conferred upon them by the will. The plastic powers of the court of chancery could be invoked to control, restrain, and energize the legatees in the discharge of their trust duties. In this forum they could be required to carry

Perry v. Drury.

out the very purpose of the testator, and misappropriation, embezzling, or wasting of the funds could be prevented by requiring security, or by removing the funds from the hands of the legatees, should they prove unfaithful.

Proceedings to obtain these remedies could be instituted at any time by beneficiaries of the trust, or by persons interested therein, and actions could be prosecuted whenever the legatees, or their successors, become unfaithful, or the interests of the beneficiaries demanded it.

These powers of equity are not abridged by statute, and are not conferred upon the probate courts by Code, § 2312.

Under this provision the courts last named are clothed with exclusive jurisdiction of probate matters and no chancery powers are conferred upon them. As the plaintiffs are not to be regarded as trustees, in the sense of the term as used in this provision, and in § 2350, the probate court has no jurisdiction to supervise their action in carrying out the intentions of the testator, or to require them to provide against their possible defaults by the execution of bonds. It is our opinion that the Circuit Court erred in holding otherwise.

2. CIRCUIT COURT : as a court of probate : equity powers.

REVERSED.

SEEVERS, J., dissenting.

GROVES ET AL V. RICHMOND ET AL.

1. **Jurisdiction: WHEN CONFERRED BY CONSENT.** The rule that jurisdiction cannot be conferred by consent applies only where the court has not the right to assume general jurisdiction of the subject matter of an action; where the court has such general jurisdiction the parties may waive the ordinary process by which it is invoked.
2. —: —: **RULE APPLIED.** Where the District Court granted a writ of *certiorari* in a matter of which the Circuit Court has exclusive jurisdiction, it was held that an agreement by the attorneys of the parties that the action should be transferred to the Circuit Court, and should stand as though originally commenced there, conferred upon such court jurisdiction to proceed and determine the questions involved in the action.

56	69
87	655

Appeal from Palo Alto Circuit Court.

FRIDAY, APRIL 22.

THIS is a proceeding in *certiorari* to test the validity of an order made by the defendants submitting to vote the question of relocating the county seat of Emmet county. The court dismissed the proceeding. The plaintiffs appeal.

Soper & Allen and *J. W. Cory, Jr.*, for appellants.

Jo. Harry Call, *Geo. E. Clarke*, and *Coolbaugh & Call*, for appellees.

DAY, J.—This action was commenced in the Emmet county District Court, on the 1st day of September, 1879. The writ of *certiorari* was allowed by the Hon. E. R. Duffie, district judge, September 14, 1879, and was issued and served on the same day. On the 15th day of November, 1879, the defendants filed their return and certified up the record of their proceedings. On the same day the defendants filed the application for a change of venue, and the court ordered that the cause be transferred to the District Court of Palo Alto county. From this order the plaintiffs appealed, and the appeal was

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afterward dismissed. See *Groves v. Richmond*, 53 Iowa 570. Pending this appeal, and in vacation, on the 6th day of January, 1880, the parties, by their respective attorneys, entered into an agreement as follows: "It is hereby stipulated and agreed by the parties to this action:

"1st. That the same be transferred from the District Court of Palo Alto county, to the Circuit Court of Palo Alto county, Iowa, and that the same stand in said court, to all intents, and for all purposes, the same as though said cause had been commenced in the Circuit Court.

"2d. That the same stand continued at the January term of said court.

"3d. That if in the appeal taken in this cause it shall be determined that this cause is not triable to a jury, over plaintiffs' objection, that the cause be thereupon sent to Emmet county, Iowa, to be tried to the court." This stipulation was entered into after counsel became aware of the decision in this court in *Keniston v. Hewitt*, 48 Iowa, 679, holding that the Circuit Court has exclusive jurisdiction in *certiorari* in civil matters. The stipulation was filed in the Palo Alto District Court, January 17, 1880. At the January term of the Palo Alto Circuit Court the cause was continued "as per stipulation on file." At the August term of said court the defendants filed a motion as follows: "Comes now J. H. Warren, one of the parties impleaded as a defendant in this action, and moves the court to strike from the files of this court the pretended writ of *certiorari* heretofore issued herein by the clerk of the District Court of Emmet county, Iowa, the order therefor made by E. R. Duffie, judge of the District Court of the 14th judicial district of Iowa, and the return thereto filed ———, ———, 1879, for the reason:

1st. The District Court, the clerk and judge thereof, had no jurisdiction of the subject matter of said action and the same are null and void. The said J. H. Warren further moves the court to dismiss said cause, and to strike the same from the calendar for the following reasons:

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"1. Because all the proceedings in said case are null and void.

"2. Because jurisdiction of the subject matter is conferred, if at all, by the writ of *certiorari* issued herein, and the same being void, the court has no jurisdiction of the subject matter.

"3. Because the District Court had no jurisdiction of the subject matter of this proceeding, and the same could not be prosecuted in either the District Court of Emmet county, or the Circuit Court of Palo Alto county, and the court cannot acquire jurisdiction by a transfer of the cause.

"4. Because more than one year from the date of the alleged irregularities and illegal acts complained of has elapsed, and no legal writ of *certiorari* having yet issued, none can now be granted.

"The said J. H. Warren further moves the court that he be dismissed from this cause as a defendant herein, and as cause thereof shows that he is no longer a member of the board of supervisors of Emmet county, his term of office having expired, and his successor in office being duly elected and qualified."

The plaintiffs thereupon filed a motion to substitute F. C. McGrath and Chas. Jarvis as defendants in place of J. H. Warren and Henry Barber, whose terms of office as members of the board of supervisors of Emmet county had expired. In resistance of the motion to dismiss the plaintiffs filed the affidavit of E. B. Soper, one of the attorneys, stating in substance that he went to the office of George E. Clarke, one of the attorneys of the defendants, and stated to him that he had discovered the case of *Keniston v. Hewitt*, 48 Iowa, 679, holding that the Circuit Court had exclusive jurisdiction in *certiorari* in civil cases, and that the proceedings in the cause in the District Court were of no effect, and that plaintiffs and their attorneys had decided to enter a dismissal of the case in the District Court and commence the case anew in the then impending January term of the Circuit Court of Emmet county,

unless the defendants would consent to a transfer of said cause to the Circuit Court to stand there with all the proceedings as though had in the Circuit Court; that Mr. Clarke said he would consult with his associate, Mr. Call, and if he made no objections they would consent and stipulate for the proposed transfer, and that subsequently the agreement herein above set out was signed. The defendants filed the counter affidavit of Geo. E. Clarke, as follows: "That at the time E. B. Soper came to him in reference to the stipulation referred to by him in his affidavit, this affiant realizing the importance of winding up and settling the cause to the inhabitants of Emmet county, and being of the opinion that consent could not confer jurisdiction of the subject matter upon the Circuit Court of Palo Alto county, he entered into said stipulation therein referred to, thus hoping speedily to settle the much vexed question in accordance with the wishes of the majority of the people and voters of Emmet county."

The motion of the defendant Warren was sustained, and he was dismissed from the cause as he prayed. Thereupon the court upon its own motion dismissed the cause as against all the defendants upon the ground that the stipulation and the transfer of the proceedings from the District Court to the Circuit Court conferred no jurisdiction upon the Circuit Court to try the cause.

It is apparent from the affidavit of defendants' counsel, the stipulation in the agreement for the continuance of the cause beyond the January term, and the action subsequently taken, that the stipulation was given for the purpose of continuing the proceeding until it should be too late to commence the action anew, and then dismiss the proceeding for want of jurisdiction. The plaintiffs ought not to be deprived of a hearing in this manner, unless there is a real legal obstacle to the Circuit Court's entertaining jurisdiction of the cause.

1. JURISDICTION: when conferred by consent.

It is urged by appellee that consent cannot confer jurisdiction. This is true where the court has not the right to assume general jurisdiction

of the subject matter. Consent could not confer upon the Circuit Court jurisdiction to try an indictment for murder. But, where the court has general jurisdiction over the subject matter the parties may waive the ordinary process and voluntarily submit the question to the adjudication of the court. It is claimed that it is the writ which confers jurisdiction, and that as the writ was issued by the District Court it was void, and no jurisdiction was conferred by it. Under our system of procedure the petition calls into exercise the jurisdiction of the court. The writ is necessary to obtain jurisdiction over the defendant, and to obtain a certification of the records and proceedings sought to be reviewed. There is no reason why the parties might not waive the writ, and submit the questions to be determined by a voluntary appearance, and upon an agreed statement of facts, as in any other kind of action. Now, what was done in this case? The application for a writ had been made to the District Court, the writ had been issued, the return had been made, and the venue had been changed to the Palo Alto District Court. It was thereupon agreed by the parties to the action: "That the same be transferred from the District Court of Palo Alto county to the Circuit Court of Palo Alto county, Iowa, and that the same stand in said court, to all intents and for all purposes, the same as though said cause had been commenced in the Circuit Court." The effect of this agreement is that the petition, writ and return shall be filed in the Circuit Court, as though the petition had originally been filed there, and the writ had emanated from that court. It may be conceded that this agreement could not give vitality to a writ issued by a court not having jurisdiction. We have seen, however, that the writ may be waived. Suppose the petition in this case, under oath as a petition in a *certiorari* proceeding is required to be, had been originally filed in the Circuit Court, and that thereupon the defendants had waived the issuance of a writ, and had filed a transcript setting forth the action sought to be reviewed, and had asked the court to

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determine the question presented, can it be doubted that jurisdiction over the question would be thereby conferred? Now, that is just what was in effect done in this case. The mere fact that the petition and return were filed in the District Court before they were filed in the Circuit Court certainly cannot affect their legal operation. Nor does the fact that a controversy arising in Emmet county was submitted to the Circuit Court of Palo Alto county affect the jurisdiction. If the cause had been originally commenced in the Circuit Court of Emmet county, the parties could have transferred it by agreement to the Circuit Court of Palo Alto county. If they could do this there is no reason why they cannot agree that the Palo Alto Circuit Court shall originally assume jurisdiction. The case is not like *McMeans v. Cameron*, 51 Iowa, 691, cited and relied upon by appellees.

In our opinion the court erred in dismissing this cause.

REVERSED.

56	74
79	90
56	74
111	631
56	74
134	678

SHREVES V. LEONARD.

1. **Statute of Limitations: ACTION TO RECOVER OVER-PAYMENT: FAILURE TO CREDIT PAYMENT.** Where a judgment plaintiff failed to credit a payment made on the judgment, and afterward collected the whole amount thereof on execution, it was held that an action to recover the amount overpaid was barred in five years from the date of the collection of the judgment, although the party making the payment had no knowledge that it had not been properly credited until after the expiration of that time.

Appeal from Madison Circuit Court.

SATURDAY, APRIL 23.

ACTION at law. Judgment for the defendant, and plaintiff appeals.

McCaughan & Dabney, for appellant.

John Leonard, for appellee.

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SEEVERS, J.—The material allegations in the petition in substance are: that in 1872 the defendant recovered a judgment against the plaintiff, and one Jones; that afterward, in 1873, the plaintiff paid the defendant about \$105, with instructions to apply the same in part payment of said judgment, which the defendant failed to do, and in 1874 the amount of said judgment, without allowing any credit for the sum aforesaid, was collected on execution, but the same was not collected of the plaintiff or out of his property. “That the defendant by mistake and oversight neglected to credit said sum of \$105 on the judgment aforesaid, * * and willfully and fraudulently, with intent to injure and wrong plaintiff, failed and refused to credit said sum of \$105 upon * * said judgment, and kept concealed said fact from plaintiff till in the spring of 1879, when the facts first became known to plaintiff.”

This action was commenced in 1879 to recover the said sum of \$105 and interest thereon. The defendant demurred to the petition on the ground the cause of action was barred by the statute of limitations. The demurrer was sustained.

I. It is provided by statute that actions “founded on unwritten contracts, * * or for relief on the ground of fraud; in cases heretofore solely cognizable in a court of chancery * * are barred in five years,” but if grounded on fraud the action “shall not be deemed to have accrued until the fraud * * * shall have been discovered by the party aggrieved.” Code, §§ 2529, 2530.

It is not certain counsel for the appellant claim this case is within the statute, but conceding he does we think the action is barred, because it was not before the statute was enacted “solely cognizable in chancery.” *Gebhard v. Sattler*, 40 Iowa, 152; *Brown v. Brown*, 44 Id., 349; *Phoenix Ins. Co. v. Dankwardt*, 47 Id., 432; *Higgins v. Mendenhall*, 51 Id., 135.

II. We think the action did not grow out of the fraud, but existed independent of it. For when the defendant failed to credit the amount paid, or at least when in 1874 he collected the whole amount of the judgment, a cause of action accrued to the plaintiff against the defendant for money had and received. The statute began to run at that time, and as more than five years had elapsed before the action was commenced, it is fully barred unless saved by the allegations of the petition.

Counsel for appellant insist the fraudulent concealment averred in the petition prevents the running of the statute until its discovery. The rule on this subject in *The District Township of Boomer v. French*, 40 Iowa, 601, is thus stated: "Where the party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment prevented such other from obtaining knowledge thereof, the statute would only commence to run from the time the right of action was discovered, or might, by the use of diligence, have been discovered." In that case the fraud and fraudulent concealment consisted of "fictitious entries," and other representations whereby the defendant kept from "plaintiff's knowledge the fact of the receipt" of certain money received by the defendant as treasurer of the plaintiff. This case was followed in *Findley v. Stewart*, 46 Iowa, 655. In the last case the fraud consisted in the destruction of a deed, and the concealment of such fact. It will be observed that in both of these cases an affirmative act, fraudulent in character, was done and concealed, and on such acts the rule is based, as we understand. Suppose in the case just cited the defendant therein, instead of making fictitious entries and other representations, had kept silent, and failed to disclose the fact he had received a particular sum of money, it would not, we think, be claimed the statute did not commence to run from the time the money was received.

In the case at bar the defendant did not agree he would credit the money on the judgment, nor did the plaintiff in-

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quire if he had done so. He failed to make the credit through "oversight and neglect." The plaintiff knew as well as the defendant the money had been paid; there could not, therefore, be any fraudulent concealment as to this. But it is said he fraudulently concealed the fact no credit had been given; that is, he kept silent and did not actively pursue the plaintiff and inform him that because of his neglect the plaintiff's cause of action had accrued against him. This he was not bound to do, and the demurrer was properly sustained.

AFFIRMED.

YERGER V. BARZ ET AL.

1. **Mortgage: PRIORITY OF LIENS: RECORDING LAW.** Section 1944 of the Code, providing that the indexing of a deed or mortgage by the recorder, after it is filed for record, shall constitute constructive notice of the rights of the grantee therein, contemplates the remaining of the instrument in the recorder's office until recorded, which is required to be as soon as practicable thereafter. Where a mortgage was withdrawn from the recorder's office after being indexed, and was not recorded for two years, it was held that third parties acquiring rights in the property in the meantime, in good faith, and without knowledge of the existence of the mortgage, were not charged with notice thereof by the records.
2. **Principal and Agent: NOTICE TO AGENT: WHEN BINDING ON PRINCIPAL.** The rule that notice to an agent is notice to his principal applies only to knowledge acquired by the agent in the particular transaction, or which, if previously acquired, is still present in his mind at the time of his agency.
3. **Mortgage: PRIORITY OF LIENS: ASSIGNMENT.** As to priority between the holders of different mortgages, an assignee occupies no better position than his assignor.

56	77
113	210
56	77
119	138

Appeal from Keokuk District Court.

SATURDAY, APRIL 23.

THIS action is instituted for a judgment upon notes, and the foreclosure of a mortgage against the defendants, Herman and Maria Barz, and for a decree declaring the lien of plain-

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tiffs to be superior to that of the other defendants. The defendants Covill and The Iowa Loan and Trust Co., by way of cross-bill, ask the foreclosure of mortgages against their co-defendants, and pray that the lien in favor of each respectively be declared superior to the lien claimed by plaintiff. The court granted the plaintiff the relief asked. The defendants Covill and The Iowa Loan and Trust Co. appeal. The facts are stated in the opinion.

Brown & Dudley and *Sampson & Brown*, for appellants.

C. H. Mackey and *Woodin & McJunkin*, for appellees.

DAY, J.—I. On January 18, 1877, Herman Barz and wife executed a mortgage on the lands in controversy to F. H. Gaylord to secure him or his order in the payment of \$1,000, evidenced by five promissory notes, dated December 25, 1876, and due, respectively, in one, two, three, four, and five years from date. The mortgage was acknowledged, and, on January 27, 1877, was filed for record in the office of the recorder of Keokuk county, and all the statutory entries were made in the index books, except the page of the book where the record of the mortgage was made. The recorder also made the required indorsements upon the mortgage, stating that it was recorded in book 10, on page 294, of mortgage land records. The mortgage was subsequently withdrawn from the recorder's office by the mortgagee, and on March 18, 1878, the first three notes of the series, together with the mortgage, were transferred, for value, to plaintiff by Gaylord. On August 18, 1878, defendant Covill loaned Barz \$800, and to secure the payment of the loan Barz and wife made their mortgage to Covill on the land in controversy. This mortgage was acknowledged and filed for record in the office of the recorder of Keokuk county, August 30, 1878, and recorded in book 12, page 597, of the mortgage records of said county.

1. MORTGAGE:
priority of
liens : record-
ing law.

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On the same day, Barz and wife, for the purpose of securing The Iowa Loan and Trust Company in the payment of ten notes of \$8.00 each, one due each six months after August 1, 1878, made a mortgage on the same land, which was also recorded in the same book, on page 600, as the Covill mortgage. By its terms this mortgage was junior to the Covill mortgage. Both mortgages were duly indorsed as required.

On the 8th or 9th of January, 1879, it was discovered that the mortgage to Gaylord, then in the possession of the plaintiff, had not, in fact, been recorded. On the morning of January 9, 1879, the mortgage was procured from the plaintiff by Jones, recorder of Keokuk county for 1877 and 1878, but whose term of office expired January 1, 1879, and recorded in mortgage records, book 10, page 264, and the page on the indorsement on the back of the mortgage was changed accordingly, and the index was completed by entering in the proper column the page of the book where the mortgage was recorded. The loan by Covill to Barz was negotiated through The Iowa Loan and Trust Company upon an abstract of title prepared by Johnston & Hawkins, and forwarded to the Iowa Loan and Trust Company by James & Son. This abstract of title contained no reference to the indexing of the mortgage to Gaylord.

The first and principal question presented by the record is the following: Were Covill and The Iowa Loan and Trust Company, at the time of accepting their respective mortgages, affected with constructive notice of the mortgage to Gaylord? The provisions of the statute upon the subject are found in the following sections of the Code of 1873.

"Section 1941. No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded in the office of the recorder of the county in which the land lies, as hereinafter provided.

"Section 1943. The recorder must keep an entry book or index, the pages of which are so divided as to show in paral-

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lel columns: 1, the grantors; 2, the grantees; 3, the time when the instrument was filed; 4, the date of the instrument; 5, the nature of the instrument; 6, the book and page where the record thereof may be found; 7, the description of the land conveyed.

"Section 1944. The recorder must indorse upon every instrument properly filed in his office for record the time when it was so filed, and shall forthwith make the entries provided for in the next preceding section, except that of the book and page where the record may be found, and from that time such entries shall furnish constructive notice to all persons of the rights of the grantee conferred by such instrument.

"Section 1946. Every such instrument shall be recorded as soon as practicable in a suitable book, to be kept by the recorder for that purpose; after which he shall complete the entries aforesaid, so as to show the book and page where the record is to be found."

It is to be observed that under section 1941 no instrument possesses validity as to subsequent purchasers unless recorded in the manner provided in the following sections.

These sections provide for the making of an index, the indorsement upon the back of the instrument of the time when filed, and the recording of the instrument itself as soon as practicable. These requirements are all made essential by the statute, and it is not competent for the court, by construction, to dispense with one or more of them. It is true section 1944 provides that the entries upon the index book and upon the instrument filed shall furnish constructive notice to all persons of the rights of the grantees. But this provision clearly contemplates that the instrument itself shall be recorded as soon as practicable. Otherwise it would be in direct conflict with section 1941, which declares that the instrument shall possess no validity as to *bona fide* purchasers unless recorded as subsequently provided. The statute clearly contemplates that an instrument once filed shall remain

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with the recorder until actually recorded, and that, intermediate the date of filing and the date of the actual record, the entries upon the index shall furnish constructive notice. As the mortgage was withdrawn from the files of the recorder, and had not been recorded at the time the mortgages to the defendants, Covill and The Iowa Loan and Trust Company, were executed, we are of opinion that these defendants cannot be affected with constructive notice of the mortgage under which the plaintiff claims. The case of *Barney v. McCarty*, 15 Iowa, 510, although arising under the Revised Statutes of 1843, is, in its reasoning, entirely applicable to this case.

II. The application for the loan was made to James & Son, who procured an abstract of title and forwarded it, with the application, to The Iowa Loan and Trust Company. When the company procured the money from Covill, they sent it, together with a coupon note and mortgage ready for execution by Barz and wife, to James & Son. James & Son paid over the money to Barz, secured the proper execution of the notes and mortgage, procured the mortgage to be recorded, and returned it, with the notes, to The Iowa Loan and Trust Company. It is claimed that James & Son were the agents of Covill, that they had knowledge of the Gaylord mortgage held by plaintiff, and that the knowledge of the agent affects the principal. If James & Son were informed at all of the Gaylord mortgage, it was through a conversation which the plaintiff had with James on the 18th day of March, 1878, more than four months before the mortgages to the defendants were executed. James did not acquire the information when engaged in the transaction of any business for Covill, but long before his agency for Covill had any existence, if he is to be regarded, under the evidence, as the agent of Covill. It does not appear that James retained this information in mind at the time the mortgages to the defendants were executed. Upon the contrary, James testifies that he has no

2. PRINCIPAL
and agent:
notice to
agent: when
binding on
principal.

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recollection of any conversation with the plaintiff about the Gaylord mortgage. We are clearly of the opinion that Covill, under the circumstances disclosed, cannot be affected by any information imparted to James. See Story on Agency, § § 140 and 140a; *The Distilled Spirits*, 11 Wallace, 356; *Day v. Wamsly*, 33 Ind., 145.

III. The Iowa Loan and Trust Company, it is conceded, acted as the agent of Covill in effecting the loan. It is claimed that C. E. Fuller, the treasurer of this company at the time the loan was made, had knowledge of the mortgage under which plaintiff claims, and that this knowledge affects Covill. Fuller, amongst other things, testifies as follows: "In the Summer of 1878 the company received an application from Herman Barz for a loan of \$800, offering as security certain real estate. The money to fill the application was received from Stephen H. Covill, of Vermont. The application was sent to said company by S. A. James & Son, of Sigourney, Iowa, as the agents of said Barz. The application was signed by Barz, but sent by S. A. James & Son, and was accompanied by an abstract of title of the premises described in the application. The Iowa Loan and Trust Company had no other knowledge of the title except such as was revealed in the abstract. At the time of negotiating said loan for Barz, neither the Iowa Loan and Trust Company, nor myself, had any knowledge that plaintiff, Yerger, had or claimed to have a mortgage on said premises outstanding prior to the loan from Covill. We had nothing, either personally or officially, to do with the making of the abstract. S. A. James & Son furnished us all the information we had as to the property, except such as was furnished by Mr. Barz and by the abstract. The Company guaranteed the collection of the loan to Covill, and it would not have been recommended by us to Mr. Covill, or guaranteed, had we had any information whatever that Yerger had, or claimed to have, any interest in the property. Said Barz owes said company, on a second mortgage, for eighty dollars, in installments of ten

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dollars each, secured by a mortgage junior to that given to Covill. We had no knowledge of there being any other claim prior to that of Covill; supposed that Covill's mortgage was the first lien upon the premises and ours the second one. I do not think of anything material, other than that in the application Barz made affidavit that the property was unincumbered, except the mortgage to Gaylord, which was paid off with the money obtained from Covill: This was not the mortgage claimed to be owned by Yerger." It is this last part of Fuller's testimony upon which the plaintiff relies to affect Fuller with notice of the Gaylord mortgage. The evidence shows that Barz executed two mortgages to Gaylord. The first was satisfied January 27, 1877, when the second was issued. The plaintiff claims that Barz must have referred, in his application, to the mortgage assigned to plaintiff, as the other had been satisfied before that time, and Fuller is mistaken in saying that the mortgage referred to was not the one claimed to be owned by Yerger. The probability is that the witness intended to refer to the mortgage to the German Savings Bank, a release of which, dated August 20, 1878, was filed for record August 30, 1878, the same day that the defendants' mortgages were acknowledged and filed for record. But whatever Barz referred to, or was understood to refer to, it is clear from the evidence that he was not understood by Fuller to refer to the mortgage now claimed by plaintiff. To so hold would be directly in the face of his positive testimony, and would be inconsistent, not only with all the preceding portion of his testimony, but with the act of the company in guaranteeing the loan and accepting security to themselves upon the property in question.

IV. It is claimed that the burden of proof is upon the defendants, The Iowa Loan and Trust Company and Covill, to establish that they are purchasers, for a valuable consideration, without notice, and that they have not sufficiently established that fact. Without determining on which party rests the burden of proof, we think the defendants have es-

Yerger v. Barz.

tablished their want of notice. We have already set out the testimony of Fuller. Covill testifies as follows:

"I had no knowledge when the loan was made that J. P. Yerger had any, or claimed to have a mortgage on the said premises prior to the mortgage taken by me." It is said that, as the mortgage was originally executed to Gaylord, Covill may not have known that Yerger claimed to have any mortgage upon the property, and yet may have known of the mortgage to Gaylord, assigned to Yerger. But this position is clearly negatived by the testimony of this witness as follows: "The premises were represented to me by the Iowa Loan and Trust Company to be free and clear of incumbrances of any kind, and I supposed that I was getting the first lien upon the premises, and, relying upon said representations, advanced my money in good faith."

V. It is claimed that as the plaintiff is the assignee of the mortgage for value, he stands in a better position than his assignor, and must be protected, whatever might be the rule if Gaylord were the party seeking the foreclosure of the mortgage. In support of the position the plaintiff cites *Preston, Kean & Co. v. Morris, Case & Co.*, 42 Iowa, 549; *Farmers' National Bank v. Fletcher*, 44 Id., 252; *Vandercook v. Baker*, 48 Id., 199. The principle invoked is not applicable to the present case. The question involved here is one of priority under the registry statutes. As to priority between the mortgagee and parties holding under other mortgages, the assignee can occupy no better position than the assignor. The court below erred in allowing the plaintiff the priority of lien.

REVERSED.

District Township of Spencer v. District Township of Riverton.

DISTRICT TOWNSHIP OF SPENCER V. DISTRICT TOWNSHIP OF
RIVERTON ET AL.

56	86
99	116
56	85
106	696

1. School District: REFUNDING ILLEGAL TAX: CHANGE OF BOUNDARIES.

Where a school district from which an illegal tax had been collected, and by which it was expended, was afterward subdivided, it was held that the county treasurer, in refunding such tax under section 870 of the Code, should apportion the amount refunded between the different districts occupying the territory from which it was collected.

- 2. ———: ———: CONTRIBUTION.** The treasurer having refunded a portion of such tax entirely from the funds of the district having the same name as the one from which it was collected, but occupying only a portion of the territory, it was held that such district, after demand upon those occupying the remaining territory, might maintain an action against them for contribution.

Appeal from Clay District Court.

SATURDAY, APRIL 23.

ACTION in equity to enforce a contribution. The district township of Spencer, in the county of Clay, once embraced not only the territory now embraced in the plaintiff district township of the same name, but also the territory embraced in the defendant district township of Riverton, and the territory embraced in the defendant independent district of Spencer. Before the division a certain illegal tax had been collected, paid over, and expended. After the division a portion of the taxpayers applied to the county to refund to them the tax paid by each, respectively, and the county treasurer refunded the same under the order of the board of supervisors directing him so to do. In doing so he refunded wholly from the funds in the county treasury belonging to the plaintiff district township. The plaintiff avers in substance the above stated facts, and prays that the defendants be decreed to reimburse the plaintiff by way of contribution to the extent of what is their equitable proportion, respectively. To the petition the defendants demurred and the demurrer was sustained. The plaintiff's petition having been dismissed, it appeals.

District Township of Spencer v. District Township of Riverton.

E. E. Snow, for appellant.

Ackley Hubbard, for appellees.

ADAMS, CH. J.—Section 870 of the Code provides that the board of supervisors shall direct the treasurer to refund to the tax payer any tax found to have been erroneously or illegally exacted or paid. Where an illegal tax has been collected for the benefit of the county, and the same has been expended, it seems to us that it would be proper to refund the same from other funds belonging to the county. So, too, where an illegal tax has been collected for the State, or a school or road district, and the county has paid over the same to the State, school or road district, it seems to us that it would be proper to refund the tax (in case it becomes necessary to refund it) from other funds belonging to the State, school, or road district which had thus received and enjoyed the benefit of the illegal tax. It is true that in *D. M. & M. R. R. Co. v. Lowry, county treasurer*, 51 Iowa, 486, it was held that the defendant could not be allowed to refund an illegal tax voted and paid by the taxpayers of one township in aid of the plaintiff's railroad from taxes voted and paid in aid of the same road by the taxpayers of a different township. But the ruling in that case is not inconsistent with the view herein expressed, because the ruling was based upon the theory that the taxes from the different townships constituted distinct funds. If, then, in the case at bar, there had been any funds in the county treasury belonging to the original district township, such funds being all of one character, it seems to us that the illegal tax might have been refunded therefrom. But, strictly speaking, there were no such funds. There were funds collected from the taxpayers belonging to the same territory. But the taxes thus collected constituted three funds, and it is evident that if the treasurer was justified in refunding at all, he should have refunded from all three of the funds.

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District Township of Spencer v. District Township of Riverton.

But he could not do this without making an apportionment, and the statute confers no express authority upon the treasurer to make an apportionment.

If no division of the territory had been made, the taxable property of the territory constituting the district would have borne the burden practically according to its valuation. The same property, notwithstanding the division, should, we think, bear the same burden in the same way. The valuation was a matter of record, and nothing was necessary to make the apportionment but a mathematical computation. This we think the treasurer might have done. The power to do so, we think, is necessarily incident to the power expressly conferred to refund.

As opposed to this view it is urged that the power to make an apportionment is conferred upon the boards, jointly, of the several districts. Code, § 1715. That section provides in substance that in case of a division of a district township, whereby two or more district townships are constituted, the respective boards of directors shall immediately afterward make an equitable division of the then existing assets and liabilities. This not having been done it is insisted that it was not for the treasurer and is not now for the court to make a division.

So far as the refunding of the tax in question is concerned there was, we think, no liability within the meaning of the statute. The county was liable, possibly, but only so far as it has funds in its hands belonging to the districts carved out of the original district township. No liability could be asserted by the taxpayers directly against the subdivisions. The provision, then, in regard to the division of the liabilities resting upon the original district township has, we think, no application to this case. We see no reason, then, why the treasurer, in the discharge of his ministerial duty of refunding the illegal taxes from the funds belonging to the school districts carved out of the original territory, might not make

District Township of Spencer v. District Township of Riverton.

the mathematical calculation necessary to determine how much should be refunded from each fund.

We come, then, to inquire whether, as the treasurer made a mistake, the plaintiff has any equitable claim upon the ^{2. —; —;} defendants. In our opinion it has. The treasurer ^{contribution.} was charged by law with the duty of refunding a portion of the tax from the funds belonging to the defendants. By mistake respecting his duty he refunded the whole from funds belonging to the plaintiff. By reason of that mistake the defendants have received, or will receive, from the treasurer more funds than they were entitled to. A court of equity, it appears to us, has the power to rectify the mistake and properly adjust the burden by compelling a contribution.

But it is said that no action will lie until after a demand has been made upon the defendants, and that the petition shows no such demand.

Section 1733 of the Code provides that "the board of directors shall audit and allow all just claims against the district * * * and that no order shall be drawn on the treasury until the claim for which it has been drawn has been audited and allowed." The claim in question could be properly paid only by an order drawn upon the treasury, but as no such order could be properly drawn until the claim had been audited and allowed by the board, and as the board could not be expected to audit and allow the claim until it had been presented, it appears to us that a presentation of the claim was a condition precedent to a right of action. The action, then, was premature, and we must hold that the demurrer was properly sustained, but under the views above expressed it would be the duty of the defendants' boards, upon presentation to them of the respective claims against the districts, to audit and allow them if the facts stated are true; and if they refuse, upon due presentation, the plaintiff, we think, may maintain an action.

AFFIRMED.

The B., C. R. & M. R. Co. v. The County of Benton.

THE B. C. R. & M. R. Co. v. THE COUNTY OF BENTON.

1. **Res Adjudicata: COMPROMISE DECREE: ESTOPPEL.** A compromise decree, entered in an action to recover on a contract, was held not to estop the defendant from denying the performance of the contract by the plaintiff in a subsequent action thereon.
2. **Contract: COUNTY: WAIVER.** Where a contract required a vote of the electors to render it binding on a county, it was held that its performance by the other party could not be waived, nor the county estopped from denying such performance, by the action of its board of supervisors in making payments thereunder.

Appeal from Benton Circuit Court.

SATURDAY, APRIL 23.

ACTION in equity. The petition was dismissed and the plaintiff appeals.

Traer & Burnham and *W. A. Tewksbury*, for appellant.

J. D. Nichols and *Gilchrist & Haines*, for appellee.

SEEVERS, J.—Because it will conduce to brevity it will be conceded the plaintiff and defendant, in 1866, entered into a contract which was adopted by a vote of the electors of the county as provided by law.

Among other things the defendant agreed in said contract it would “transfer and convey” to the plaintiff “all of the right, title, and interest (of the defendant) of, in, and to all the swamp and overflowed lands in said county of Benton, and also all the proceeds of the sales of said lands now in the possession of the said county of Benton, or hereafter to be received by said county from the general government, or otherwise, or to which said county may be entitled, after all cost and expense of selecting and proving up said lands have been paid.”

In consideration of the foregoing, the plaintiff agreed to

The B., C. R. & M. R. Co. v. The County of Benton.

"build and operate, by running cars thereon, a railroad from Cedar Rapids * * * * via Vinton to the west line of and through the said county of Benton, on or before the 31st day of December, 1867," and if said railroad was not "graded ready for the ties and iron, by the time above stated, to the west line of said county and the cars running as far as Vinton on or before the first day of September, 1867, then this contract shall be null and void; and all rights and interests in said lands," acquired by the plaintiff under said contract, "shall be forfeited."

In 1870 an action was brought by the plaintiff against the defendant on this contract, and in 1872, in accordance with a stipulation of the parties, a decree was entered requiring the defendant to convey to the plaintiff certain described lands as enuring to it under the contract.

Afterward the defendant's board of supervisors conveyed certain other lands to the plaintiff, and it was paid certain money as belonging to it under the contract.

Afterward the defendant received from the general government about \$8,000, as the net proceeds of swamp lands which had been sold. This action is brought to recover said money, and the plaintiff pleaded the proceedings, including the decree, in the former action, the conveyance of said land, and payment of said money, as an estoppel, and claimed the defendant could not, in this action, rely on the fact the plaintiff had not performed said contract on its part in bar of a recovery.

The plaintiff, however, in an amended petition alleged it had "performed the conditions of said contract on its part to be performed."

The answer denied the allegations of the petition and alleged the said decree was rendered as a settlement and compromise of the then pending action; that the cause of action was indivisible, and that plaintiff was estopped from obtaining any additional relief in this action.

I. There was not, in fact, any adjudication by the court

The B., C. R. & M. R. Co. v. The County of Benton.

in the former action that the plaintiff had performed the contract on its part, and was, therefore, entitled to recover, but the decree therein was rendered in consequence of and in accord with a stipulation signed by the attorneys of the parties. The defendant's attorneys derived their authority to enter into said stipulation solely from certain proceedings and resolutions of the defendant's board of supervisors, which were introduced in evidence.

Therefrom it appears the board recognized the pendency of said action, and were advised of the issues pending, and therefrom determined "there is grave doubt" whether the plaintiff "will or will not be able to sustain its claim to said lands, and complete litigation will involve a large expense to said county, and * * * * * having made a careful examination of all the facts and circumstances connected with such claim * * * * * being impressed with the belief that very strong natural equities exist in favor of the claim set up by said railway company, whether they would or would not ultimately be allowed by said court," therefore the attorneys of the defendant were directed to withdraw the defense interposed and allow a decree to be entered upon certain conditions specified by the board. This was done. It is evident, we think, the decree cannot be regarded as an adjudication by the court, but the pending action was thereby settled and compromised, without reference to the question whether the plaintiff had performed the contract on its part, and, therefore, was entitled to recover.

Such a decree cannot have the force and effect of an estoppel, to the extent that the defendant cannot, in this action, insist the plaintiff cannot recover unless it has been established the plaintiff has performed the contract on its part.

II. It is urged there is no issue that the plaintiff failed to perform the contract, therefore the evidence introduced on this subject was immaterial and inadmissible. But, as we have seen, the plaintiff pleaded it had fully performed the

1. RES ADJUDICATA : compromise decree : estoppel.

The B., C. R. & M. R. Co. v. The County of Benton.

contract on its part, and this was denied by the defendant. This made an issue, and, if material to its recovery, the plaintiff was bound to establish the allegation.

III. No evidence was introduced by the plaintiff tending to show it had complied with the contract on its part. On the contrary, it is shown the road was not completed to Vinton until more than two years after the time fixed in the contract. It is true, it has been completed, and is now operated through the county to the north line. We do not think this is a substantial performance of the contract on the plaintiff's part, and, therefore, it cannot recover.

IV. Counsel for the plaintiff insist the conveyance of certain land and payment of money by the board of supervisors after the decree in the former action, as
a. CONTRACT: county: waiver. enuring to the plaintiff under the contract, estops the defendant from now insisting the plaintiff did not perform the contract on its part.

Under the statute in force when the contract was made, the board of supervisors did not have the power to make the contract. It was essential to its validity that it should be adopted by a vote of the electors of the county.

When the plaintiff failed to perform, on its part, the contract became void and of no effect, as therein provided. The board, by no act of theirs, could make it binding thereafter as a contract on the county. Nor could the board waive a compliance with its terms and conditions. This could only be done by the same authority required to enter into the contract. This required the joint action of the board and the electors.

AFFIRMED.

PORTER v. McELHINEY.

1. **Fraudulent Representations: EVIDENCE CONSIDERED.** Evidence held insufficient to establish fraudulent representations in relation to real estate sold by the defendant to the plaintiff.

Appeal from Polk Circuit Court.

SATURDAY, APRIL 23.

ACTION in equity to rescind a trade whereby the plaintiff and the defendant, McElhiney, made an exchange of real estate. The plaintiff claims a rescission upon the ground that she was induced to make the exchange by certain false and fraudulent statements made by McElhiney. The defendant denies all fraud. The court dismissed the plaintiff's petition and she appeals.

Cole & Cole, for appellants.

J. S. Clark and *A. D. Storrs*, for appellee.

ADAMS, CH. J.—In November, 1879, the plaintiff was the owner of a house and lot in the city of Des Moines, where she resided with her family. The defendant, McElhiney, was the owner of a farm in Putnam county, Mo. These two pieces of property the parties exchanged, the trade being made in the city of Des Moines. The plaintiff having never seen the Missouri property, and finding it inconvenient to make an examination of it, exacted of the defendant before trading a written statement as to the character and condition of the property, and entered into the trade in reliance upon the correctness of such statement. She avers that the statement is untrue in several material respects. The statement is in these words:

"I, Hewitt H. McElhiney, the undersigned, have this day sold to Sintha Porter a farm of 143 acres of land as described

Porter v. McElhiney.

in a deed made by me this day to her, the land being in section 2, township 64, range 17, Putnam county, Mo., and I make to Mrs. Porter the following statement in regard to the farm which I bind myself to make good, fire or violence excepted. The farm is first-class second bottom land for that county; a small portion of it only overflows, and that only in extreme high water; there is about 100 acres fenced and in cultivation; a small orchard of apple and peach trees; two dwelling houses, one with two rooms filled in with brick, and one with one room; a log stable and two cribs, neither of which has a wooden roof; a log smoke-house.

“Signed,

H. McELHINEY.”

The plaintiff complains that none of the statements are true except in regard to the quantity of land.

She also sets out in her petition a large number of statements which she avers were made by McElhiney by parol to induce her to make the exchange, and upon which she relied, and which were false and fraudulent. The defendant denies the statements alleged to have been made by parol.

As to whether they were made or not there is some conflict in the evidence. But the defendant insists that the evidence clearly shows that the trade was not made in reliance upon parol statements, if any were made, but in reliance upon the written statement alone.

This position of the defendant it appears to us is well taken. In the first place we can see no reason why the plaintiff, when she demanded of the defendant that he should put his statements in writing, should not have seen to it that the writing embraced all the statements she deemed material. In the second place it is shown in evidence that she said: “I wanted a written statement and took the one he gave me as satisfactory, and if everything had been as stated in that writing I should have been satisfied.”

We look upon this as showing conclusively that whatever

statements were made by parol, if any, were not of such a character as to induce the trade.

We have, then, to consider whether the statements made in writing were false and fraudulent.

A large number of witnesses were examined upon both sides. We cannot within the proper limits of an opinion set out and discuss the evidence in detail. It is sufficient to say that it satisfies us that the written statements made by the defendant were substantially true.

In the deed, however, made by the defendant to the plaintiff the land is described as being subject to a mortgage, whereas, what was called a mortgage was in fact a deed of trust. The deed to plaintiff was executed on the 15th day of November, 1879, and on the same day it appears that the farm was advertised to be sold under the deed of trust, the sale to take place Dec. 23, 1879. The deed was delivered Nov. 21st, 1879, but it does not appear that the defendant knew of the advertisement. He knew that there was danger of the farm being sold and he so informed the plaintiff, and advised her that it required her immediate attention. She insists, however, that the description of the incumbrance in the deed to her constituted a representation that it was a mortgage, and that inasmuch as it was in fact a deed of trust the representation was false and fraudulent.

Whether this position is well taken or not might depend upon the difference between a Missouri mortgage and a Missouri deed of trust. We can conceive that the difference may be such that the plaintiff's condition would not have been better if the incumbrance had been a mortgage.

The defendant insists that the difference is not material. In support of that view it appears that he introduced in evidence the statutes of Missouri. What those statutes showed the abstract does not disclose. It merely recites the fact that the statutes were introduced. Upon the point in question the abstract clearly does not contain all the evidence that was

 MILLER v. POAGE.

introduced, and we can make no finding of fact so far as this point is concerned.

We think the plaintiff failed to prove the allegations of her petition, and that it was rightly dismissed.

AFFIRMED.

 MILLER v. POAGE.

1. **Promissory Note: NEGOTIABILITY.** A promissory note in the ordinary form contained the following clause immediately preceding the signature: "If this agent does not sell enough in one year, one more is granted:" *Held*, that such provision rendered the note non-negotiable. DAY, J., and ADAMS, CH. J., *dissenting*.

Appeal from Linn Circuit Court.

SATURDAY, APRIL 23.

ACTION on the following instrument in writing:

"\$100. AUDUBON TR., Audubon Co., Iowa, April 26, 1878.

"One year after date I promise to pay to the treasurer of the National Iron Fence Co., of Cedar Rapids, Iowa, or order, One Hundred Dollars, at Cedar Rapids, Iowa, value received, with interest at ten per cent from date. Reasonable attorney fee if suit be instituted on this note. *If this agent does not sell enough in one year, one more is granted.*"

There was judgment for the defendant and the plaintiff appeals.

Ward & Harmon, for appellant.

I. W. Whittam, for appellee.

SEEVERS, J.—The only question to be determined is whether the instrument sued on is negotiable. The appellee insists it is not, because of the italicized words. The appellant insists the instrument is not payable out of a certain fund, and is payable at the expiration of

1. PROMISSORY NOTE:
negotiability.

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Miller v. Poage.

two years from its date, if not sooner, and is, therefore, negotiable.

We think the true construction is that the maker was the agent of the payee for the sale of something, and if he realized sufficient funds from such sales the amount specified was to be paid within one year. Payment during such time was to be made only on condition that the necessary funds were realized. This clearly implies the instrument was to be paid out of a particular fund, and for this reason, and because payable only on the happening of a condition, it was not negotiable during the period aforesaid. It is true it is payable absolutely at the expiration of two years. But we think it must have been negotiable when executed, and continuously from that time, or not at all.

No adjudicated case to which our attention has been called is precisely like this. The nearest approach to it is *Cotta v. Buck*, 7 Met., 588. It is difficult to draw a sharp distinction between the two cases. We shall not, therefore, make the attempt, but determine the case at bar upon principle, as we deem right.

AFFIRMED.

DAY, J., *dissenting*. I cannot concur in the foregoing opinion. It cites no authority and is in conflict with *Cotta v. Buck*, 7 Met., 588, to which it refers. In my opinion the instrument in question possesses all the elements of negotiability. The italicized portion does not render the note payable out of a particular fund, but simply provides a condition upon which the payment shall be extended one year. The note may be payable in one year. It is payable absolutely in two years. In my opinion the plaintiff should have recovered.

ADAMS, CH. J., concurs in this dissent.

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 Red v. Polk County.

RED V. POLK COUNTY.

1. **Costs: ON APPEAL IN CRIMINAL CASE: LIABILITY OF COUNTY FOR.**

A county is not liable for the cost of printing the abstract and argument of a defendant convicted of crime on his appeal to the Supreme Court, though the judgment against him is reversed on such appeal; section 8790 of the Code has reference only to sheriff's fees.

Appeal from Polk Circuit Court.

SATURDAY, APRIL 23.

ACTION to recover of the defendant, Polk county, certain fees. The plaintiff was convicted of the crime of murder. He appealed to the Supreme Court, and the judgment was reversed and remanded, and in the court below the case was dismissed. He avers that in the prosecution of said appeal in the Supreme Court he was obliged, under the rules of said court, to print, and did print, for the use of said court, an abstract of the pleadings and evidence in said cause, and also the argument of his counsel therein, and has paid for said printing, and that, by the rules of said court, he is entitled to have taxed, as costs in said case, the sum of eighty-three dollars.

To the petition the defendant demurred, and the demurrer was sustained. Judgment having been rendered for the defendant, the plaintiff appeals.

Bowen & Leavens, for appellant.

John A. McCall, for appellee.

ADAMS, CH. J.—Four questions are certified, but it will be sufficient for the disposition of the case to determine the fourth one. That question is in these words: "Where a person is indicted, tried, and convicted of a crime in the District Court, and appeals from the judgment of such District Court to the Supreme Court of the State, and in the

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Red v. Polk County.

prosecution of an appeal prints an abstract of the record and the argument of his counsel for the use of the Supreme Court, as required by the rules of said court, and upon the hearing in the Supreme Court the judgment of the District Court is reversed and the cause is remanded for a new trial, and such defendant is afterwards discharged in the District Court, is the county where such defendant was so indicted and tried liable to pay a printer's fee for printing such abstract and argument, at the rate of one dollar for each five hundred words embraced in a single copy of the same?"

The plaintiff relies upon section 3790 of the Code, which is in these words: "In all criminal causes where the prosecution fails, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice so far as their knowledge extends, and verified by the affidavit of the sheriff, the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury." But, in our opinion, the foregoing was designed to provide only for the payment of sheriff's fees. It is true the language of the provision does not necessarily show such limitation. But the section is found under the heading of "compensation of sheriffs," and the section itself provides that the facts upon which the claim for the fees as against the county rests shall be verified by the affidavit of the sheriff. As he could not be supposed to be cognizant of the facts pertaining to any other fees than his own, the plain inference is that the fees contemplated in the section are his fees. Furthermore, as evidence that the statute was not designed to have general application, fees other than sheriff's fees are provided for elsewhere. The statute, however, does not provide for the payment by the county of costs like those in question, and it appears to us that the county is not liable.

AFFIRMED.

RINK ET AL. V. SAMPLE ET AL..

1. **Contract: FOR SALE OF LAND: EVIDENCE CONSIDERED.** Evidence considered and held sufficient to establish a verbal contract between the defendant and one since deceased, in pursuance of which the latter transferred possession of certain land to the defendant, in consideration of his support during the remainder of his natural life.

Appeal from Lee District Court.

SATURDAY, APRIL 23.

ACTION for the partition of 43 acres of land in Lee county. The land, at one time, belonged to one Wiley Clay, who died intestate, in June, 1872. The action is brought by Daniel, Samuel H., and Adaline Rink, who claim to be heirs of Clay and each the owner of 1-27 undivided part of the land. Twenty-one other persons, alleged to be heirs, are joined as defendants under the general designation of "Heirs of Elizabeth Harris," "Heirs of John Clay," and "Heirs of Jacob Clay," the names of such heirs not being given nor yet alleged to be unknown. The persons named as heirs, whether as plaintiffs or defendants, aver that Wiley Clay died seized of the land. The defendant George Sample denies this averment, and avers that he is the owner of the land by the purchase thereof from Clay. There was a decree for the defendant, Sample. The other defendants and the plaintiffs appeal.

Casey & Casey, for plaintiffs, appellants.

Sample & Powell, for defendants, appellants.

Van Valkenburg & Hamilton and *Craig & Collier*, for appellees.

ADAMS, CH. J.—It is not claimed by the appellee that he ever received from Wiley Clay a conveyance of the land. His title, so far as the same was derived directly from Clay,

Rink v. Sample.

was, if he had any title, an equitable one, and accrued by reason of a parol agreement, entered into between the appellee and Clay, whereby the appellee was to support and take care of Clay from the time of such agreement during the remainder of Clay's life, and have as compensation therefor all of Clay's property. Whether such an agreement was made constitutes the principal question in the case. In proof of it the appellee adduced the testimony of his wife and two sons. In disproof of it the appellants adduced no direct evidence, but they insist that the appellee's witnesses are not to be believed.

The testimony of one of the sons is by no means satisfactory. What he heard and distinctly remembered would hardly evince a completed contract. But, throwing this out, there still remains the testimony of the wife and the other son. And, while both were related and both testified to a transaction which occurred several years before, and while the son was but a boy, we are not prepared to say that they are to be wholly discredited. As a circumstance tending to show that they are, the appellants rely upon a fact which remains to be stated. After the death of Clay the appellee took counsel in regard to his title and was advised to procure a quit-claim deed from the heirs. He did procure a quit-claim deed which he supposed at the time was executed by all the heirs, and paid therefor the sum of \$350. The appellants insist this fact shows that the appellee did not rely upon the alleged agreement.

It must be remembered, however, that the appellee had at best but an equitable title, and the circumstances were such that even that was liable to be disputed, as in fact it is. We think, therefore, that the appellee's expenditure of \$350, in an attempt to quiet the numerous heirs, has little if any tendency to show that the alleged agreement was not made.

Another circumstance relied upon by the appellants is that soon after Clay's death the appellee asked one or two of his neighbors to measure or estimate the corn derived from the

Rink v. Sample.

Clay estate. This, it is said, shows that the appellee did not, at that time, claim to own it under the alleged agreement.

To our mind, it would, at most, only show an apprehension that the agreement might not be sustained.

The appellee's witnesses testified that Clay delivered to him the key of his house. Upon cross-examination it was made to appear very uncertain whether they saw such delivery.

In our opinion, the fact of delivery was not important. If the alleged agreement was made it must be sustained. It is undisputed that if made it was fully executed on the part of the appellee.

Of course, if the witnesses testified to something as a matter of knowledge upon their part, when it was only an inference or conjecture, it would have some tendency to impair their general credibility. But the circumstance is not one, we think, which would justify us in concluding that their credibility is wholly destroyed.

Some other circumstances are relied upon by the appellants which we do not deem it necessary to discuss. They are of a slight character and fail to convince us, whether taken singly or together, that the un rebutted testimony of the defendant's witnesses should be discarded.

There is much, indeed, to corroborate the witnesses and make probable the fact of the agreement. It is shown by undisputed evidence that Clay spoke, upon different occasions, of giving his property to the appellee in consideration of being supported by him. It is true at the time the agreement is alleged to have been made he was apparently approaching the end of his life. His property, above his debts, was worth from \$1,200 to \$1,500. It does not seem probable that it was supposed that the reasonable cost of his support and care would amount to that much. He lived, in fact, only about one week. He was sick, and we judge dangerously so, when the agreement is alleged to have been made, but it does not appear that he was without hope of recovery and a considerable extension of life.

Rink v. Sample.

Besides, it may properly be mentioned that the appellee's house had, for many years, been to Clay somewhat in the nature of a home. Clay never had a family. Some twenty-two years previous to his death he removed from North Carolina to Iowa with the appellee and his family, and from the time of such removal it appears that he and they were intimate friends. He found employment in different places, but to these friends he was accustomed to return in his leisure and especially in sickness. About two years before his death he attempted to establish an independent home. He bought, near to the appellee, the small farm in question and built upon it a small house or cabin. Still he did not live wholly independently. The appellee's wife did his baking for him, and to some extent his washing. When the sickness came upon him, which proved to be the final one, he was removed, by his request, to the appellee's house. It was there that he died and from there that he was buried. His heirs, many of whom are made parties to this action, reside, so far as is known, in the State from which he removed. The evidence tends to show that his long separation from them had caused an estrangement. Some of the heirs were probably not known to him, even by name. Some, it appears, are not known even to the plaintiff and defendant heirs herein, nor have the exigencies of this action been sufficient to bring them to light.

Clay, on more than one occasion, expressed a desire that his property should not go to his heirs. We have no doubt that such remained his desire to the time of his death. He had this desire when he could have diverted the property by a will. He died intestate. We can but think that he died in reliance upon the agreement which it is alleged that he made with the appellee.

Having reached this conclusion, it is unnecessary to consider the validity of the quit-claim deed which he obtained from some of the heirs. In our opinion the judgment of the District Court should be

AFFIRMED.

Kaiser v. Lawrence Savings Bank.

KAISER v. LAWRENCE SAVINGS BANK ET AL.

1. **Corporation: DEFECTIVE ORGANIZATION: LIABILITY OF STOCKHOLDERS.** An attempted incorporation of a savings bank under the laws of Kansas held so defective as not to secure to the stockholders exemption from personal liability for debts of the bank.
2. —: —: —. Where a stockholder claims exemption under the provisions of a general incorporation law, he must show that the association of which he is a member has sufficiently complied with the requirements of the law to become legally incorporated; an attempt to become incorporated, and the doing of business under a claim of incorporation, are not sufficient to create such exemption.

Appeal from Muscatine District Court.

SATURDAY, APRIL 23.

SERVICE in this case was made only upon the defendant Hoag. The plaintiff, in April, 1877, became a creditor of the Lawrence Savings Bank by reason of a deposit of money made by him in the bank, which bank was located and doing business in the city of Lawrence, Kansas. As such creditor he seeks to recover of the defendant Hoag, upon the ground that the Lawrence Savings Bank was a partnership or unincorporated company, and that Hoag was a member of it. Hoag does not deny his ownership, but denies that the Lawrence Savings Bank was an unincorporated company or partnership, and avers that the same was duly incorporated under the laws of Kansas, by reason whereof he was exempt from personal liability for the debts of the bank. There was a trial without a jury and judgment for the plaintiff. The defendant Hoag appeals.

Hanna, Fitzgerald & Hughes, for appellant.

Hoffman, Pickler & Brown and *L. M. Fisher*, for appellee.

Kaiser v. Lawrence Savings Bank.

ADAMS, CH. J.—The evidence tends to show that certain individuals attempted in good faith to become incorporated under the laws of Kansas for the purpose of doing business as a savings bank, and subscribed for shares in the supposed corporation. For several years they did business as a savings bank, under the supposition that they were duly incorporated. Prior to the time that plaintiff became a creditor of the bank, the defendant Hoag purchased an interest in the bank, and remained the owner of such interest from that time forward. The question presented is whether the shareholders so far complied with the incorporation laws of Kansas as to become incorporated and secure an exemption from individual liability, and if they did not strictly become incorporated whether the fact that they did business as a corporation, not only with the general public but with the plaintiff, was sufficient to secure to them exemption from individual liability.

If the Lawrence Savings Bank became incorporated it did so under a general incorporation law, and not by reason of the grant of a special charter. The general incorporation law of Kansas constitutes chapter 23 of the statutes of Kansas. Section 8 provides that “the charter of an intended corporation must be subscribed by five or more persons, three of whom at least must be citizens of this State, and must be acknowledged by them before an officer duly authorized to take acknowledgment of deeds.” Section 9 provides that “such charter shall thereupon be filed in the office of the secretary of state.”

A certificate of the secretary of state of the State of Kansas was introduced in evidence, showing what papers, and what only, had been filed in his office pertaining to the incorporation of the Lawrence Savings Bank. The certificate shows that there were filed in his office what are denominated articles of association. The statute requires that a charter shall be filed. We are inclined to think, however, that the fact that the paper filed is denominated articles of association

1. CORPORA-
TION: defect-
ive organiza-
tion: liability
of stockhold-
ers.

Kaiser v. Lawrence Savings Bank.

instead of a charter is not sufficient to invalidate it. We proceed, then, to inquire whether the paper complies with the statute in other respects, and we conclude that it does not. The statute requires that it shall be subscribed and acknowledged by five or more persons. The paper purporting to be articles of association is so informally drawn and executed that we cannot say that it is subscribed by any one. The paper consists of eight articles. The first six articles purport to be subscribed by twenty-three persons, but the seventh and eighth articles are not subscribed, and the seventh article is, under the statute, material. But if the articles had all been subscribed they would be fatally defective for want of acknowledgement by the subscribers, or a sufficient number thereof to comply with the statute.

The defendant, however, insists that neither a charter nor articles of incorporation are necessary to the incorporation of a savings bank. In § § 127, 128, 129 and 130 of the general incorporation law are provisions in relation to savings banks. Section 130 provides that "before any such corporation (a savings bank) shall commence business a majority of the shares thereof shall be subscribed for, and the entrance fee thereon shall be paid in, and the president and secretary thereof, under their hands and seals, shall make a certificate which shall specify, first, the corporate name of such association; second, the name of the city or town in which such corporation is to be located; third, the amount of capital stock and the number of shares into which the same shall be divided; fourth, the names and places of residence of the stockholders, and the number of shares held by each; fifth, the time when such incorporation was organized; which certificate shall be acknowledged before a notary public, and recorded in the registry of deeds for the county in which such corporation is to be located."

The defendant insists that the making and recording of such certificate constitutes the act of incorporation. But it seems to us otherwise. The making and recording of the

Kaiser v. Lawrence Savings Bank.

certificate is by the terms of the provision a condition precedent to the commencement of business. We see very little if anything to indicate that it is to be deemed the act of incorporation. The certificate is to be made by the president and secretary. Before it can be made, then, there must be a president and secretary. But there cannot be a president and secretary until such officers have been duly chosen by a body of persons who have become associated under an agreement to become incorporated under a law authorizing them to become incorporated. Now, the agreement, which must not only precede the making of the certificate, but the choice of the president and secretary, who are to make the certificate, it appears to us would more naturally be deemed the act of incorporation, and we see nothing in the incorporation laws of Kansas inconsistent with this view.

Again, the certificate must state the time when the corporation *was organized*. This to our minds implies quite clearly that before the certificate is made organization must have taken place. Now, if organization must precede the making of the certificate, such organization must be effected by compliance with § 8, and other sections pertaining to general incorporations, and as we have seen § 8 was not complied with.

There are two other considerations, either of which, it appears to us, is still more fatal to the defendant's theory of individual exemption.

If we were to suppose that incorporation could take place by the simple making and recording of a certificate by the president and secretary, we should fail to find incorporation in this case, because we fail to find such certificate as the law requires. We have set out above what the certificate must show. The certificate upon which the defendant relied is in these words: "We, Andrew Terry, President of the Lawrence Savings Bank, and John K. Rankin, Secretary of said bank, do hereby certify that 10 per cent of the capital stock

Kaiser v. Lawrence Savings Bank.

of said bank has been paid in." Not one of the five things required to be certified to is certified to.

The certificate, to be sure, as set out in the abstract, follows the so-called articles of association. It is possible that the certificate was indorsed upon or attached to the articles of association. If so, it may be that the parties thereto considered that the articles were adopted into and made part of the certificate. But it appears to us that we should not be justified in importing into the certificate something not referred to by it, and which seems to have been made for an entirely different purpose.

Again, if the certificate were in due form it would fail, we think, to create an exemption from individual liability, because no exemption from individual liability is provided specifically for stock-holders in savings banks, but for stock-holders in corporations in general, and in connection with the provision for the incorporation of associations by the adoption by the corporators of a charter or articles of association.

The defendant insists, however, that in order to establish the corporate existence of the Lawrence Savings Bank as against a plaintiff it is sufficient to show authority to create the corporation, a *bona fide* attempt on the part of the corporators to become incorporated, and the doing of business as a corporation. In support of this proposition the defendant cites *The Buffalo & Alleghany Railroad Co. v. Carey*, 26 N. Y., 77. In that case the court said, "that if the papers filed are colorable, but so defective that, in a proceeding on the part of the State against it, it would for that reason be dissolved, yet by the acts of user under such organization it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution collaterally by any person." Substantially the same doctrine was enunciated in *Kurtz v. The Paola Town Co.*, 20 Kansas, 403, and *Pope v. The Capital Bank*, 20 Kansas, 440. It should be observed, however, that in those cases the defendant set up a want of incorporation of the plaintiff and sought to escape

Kaiser v. Lawrence Savings Bank.

liability upon that ground. In the case at bar the defendant sets up exemption, averring that the attempt to become incorporated and the doing of business under a claim of incorporation were sufficient to create the exemption.

It will be seen at once that the principle involved in those cases is essentially different from that in the case at bar.

It is hardly necessary to say that where incorporation has once taken place no act of forfeiture can be set up in a collateral action, until forfeiture has been judicially declared in an action brought for that purpose. See *Angell & Ames on Corporations*, Sec. 636, and cases cited. But the principle involved in those cases is essentially different from that in the case at bar.

In *Humphrey v. Mooney*, 1 Colorado, 193, a creditor of an assumed corporation sought to hold a member as a partner. It was held that as his right of action was based upon an express contract with the assumed corporation he was estopped to deny that it was in fact a corporation. The doctrine of that case is substantially that relied upon by the defendant. But it seems to us that it is not sustained by the weight of authority. The court cited in support of the decision *Eaton v. Aspenwall*, 19 N. Y., 121, and *Buffalo v. Carey*, 26 N. Y., 77, but neither of the cases, it appears to us, is in point.

There may, indeed, be certain irregularities, or omissions to comply with provisions merely directory, which would be sufficient to sustain an action brought to declare a forfeiture, but insufficient to sustain a collateral action brought to enforce an individual liability of a member. But where the attempt at incorporation is under a general law, and there is a non-compliance with the law in a material respect, there is, we think, such want of incorporation that exemption from individual liability is not secured. In *Mokelumne Hill Mining Co. v. Woodbury*, 14 Cal., 424, the court said: "There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as required of the individuals seeking to become in-

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corporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question."

Hurt v. Salisbury, 55 Mo., 310, was an action brought upon a promissory note, purporting to be executed by the directors of the North Missouri Central District Stock, Agricultural and Mechanical Association. The action was brought against the directors upon the ground that the association was not incorporated at the time the note was given, and that the directors were, therefore, individually liable. It appeared that the association at the time the note was given was fully incorporated in every respect except that it had failed to file its articles of incorporation with the secretary of state, as the statute required. It was held that the directors were individually liable.

In *Bigelow v. Gregory et al.*, 73 Ill., 197, the defendants were held liable as partners for goods sold to an assumed corporation of which they were members. The defect in the incorporation consisted in a failure to file the articles of incorporation with the clerk of the city where the corporation was to transact its business. In that case the court said: "There is a manifest difference where a corporation is created by a special charter, and there have been acts of user, and where individuals seek to form themselves into a corporation under a general law. In the latter case it is only in pursuance of the provisions of the statute for such purpose that corporate existence can be acquired. And there would seem to be a distinction between a case where, in a suit between a corporation and a stock-holder or other individuals, the plea of *nul tiel corporation* is set up to defeat a liability which he may have contracted with the other, and the case of a suit against individuals who claimed exemption from individual liability on the ground of their having become a corporation

Parker v. Parker.

formed under the provisions of a general statute. In the latter case a stricter measure of compliance with statutory requirements will be required than in the former." This is a late decision, and seems to have been made with a full recognition of the authorities claimed to hold an adverse doctrine.

See, also, *Abbott v. Omaha Smelting Co.*, 4 Neb., 416, and *Harris v. McGregor*, 29 Cal., 125.

In our opinion, the proprietors of the Lawrence Savings Bank failed to become incorporated, and there was nothing in what they did or claimed which can properly be held as sufficient to secure them exemption from individual liability. The judgment, therefore, of the District Court must be

AFFIRMED.

PARKER V. PARKER.

1. **Conveyance: DELIVERY OF DEED: WHAT IS SUFFICIENT.** A deed to property delivered to the husband of the grantee, with the intention on the part of the grantor that such delivery should pass the title, was held to divest him of the title and vest it in the grantee, although it was made without her knowledge and was not delivered to her by her husband, but came into her possession some months afterward.

56	111
87	104
56	111
352	153
56	111
111	252
56	111
118	553

Appeal from Jones District Court.

SATURDAY, APRIL 23.

56	111
138	195
53	111
141	461

THIS action is brought to set aside a deed from R. O. Peters to the defendant of a certain lot, and to quiet the title to said premises in the plaintiff. The court granted the plaintiff the relief prayed for. The defendant appeals. The material facts are stated in the opinion.

E. Keeler, for appellant.

S. T. Pierce, R. M. Bush, J. S. Stacy and A. B. Oakley, for appellee.

Parker v. Parker.

DAY, J.—The plaintiff and the defendant were husband and wife. The plaintiff owned the lot in controversy. On the 13th day of May, 1874, the plaintiff, his wife uniting in the deed, conveyed the lot in question to R. O. Peters, for the expressed consideration of \$2,500. It is claimed by the plaintiff that the consideration for this conveyance was a patent right for a churn, and that it was agreed that if the patent or territory did not prove satisfactory, Peters was to reconvey the land. We feel satisfied, however, that the real purpose of the conveyance on the part of the plaintiff was to place the property beyond the reach of his creditors, he being indebted in the sum of about \$10,000 at the time. This conveyance was filed for record June 20, 1874. The date of its delivery is not shown. Pursuant to the request of plaintiff R. O. Peters executed to the defendant a deed for the lot in question. This is signed June 1st, and acknowledged June 20, 1874, being the same day that the deed to Peters was filed for record. The deed from Peters to the defendant was delivered to the plaintiff and accepted by him. On the 13th day of September, 1876, the plaintiff procured R. O. Peters to quit claim the property in question to D. M. Hakes, representing to Peters that the former deed to the defendant had been lost or mislaid. At the time of accepting this conveyance Hakes knew of the former deed to the defendant. About the 1st of October, 1876, the defendant left the plaintiff, and she subsequently commenced an action against him for divorce, which was afterward granted. Before the divorce was granted, in November, 1876, the parties met at Dubuque and made some arrangements respecting alimony. The plaintiff gave the defendant his notes for \$1,000 in settlement of her alimony. The plaintiff represented to the defendant that he had sold the property in controversy to Hakes for \$2,000, and that Hakes had credited that amount on a debt secured by mortgage, which the plaintiff owed him. The plaintiff, to convince defendant that such sale and credit had been made exhibited a receipt from Hakes for that amount. The state-

Parker v. Parker.

ment was false, and the receipt had been procured from Hakes for the express purpose of deceiving the defendant. On the 17th day of February, 1877, Hakes and wife, without consideration, quit claimed said premises to the plaintiff. When the defendant left the plaintiff she found among the papers of the plaintiff the deed from R. O. Peters to her, took possession of it, and filed it for record October 23d, 1876. The plaintiff claims relief upon two grounds.

First. The plaintiff claims that the deed from R. O. Peters to the defendant was not delivered, and that it never took effect as a conveyance.

Second. The plaintiff claims that at the time of the agreement respecting alimony, the defendant, in consideration of the sum to be paid her, agreed to relinquish all claim to the property.

I. The conveyance to Peters being for the purpose of defrauding creditors, as against the plaintiff and his wife it vested in Peters an absolute title to the property.

1. CONVEY-
ANCE: deliv-
ery of deed:
what is suffi-
cient.

At the request of the plaintiff Peters executed to the defendant a deed for the property. Peters delivered this deed to the plaintiff. It cannot be doubted from the evidence that Peters intended that this deed should take effect from the time of this delivery as a conveyance. He intended to surrender all control and dominion over the property. The delivery of the deed to the plaintiff with the intention that it should take effect as a conveyance, and the acceptance of the deed by the plaintiff, operated to divest Peters of his title to the property, and as the title must rest somewhere, and could vest in no one except the grantee named in the deed, it follows that the title vested in the defendant at the moment that it passed from Peters. This is certainly so since the conveyance was coupled with no condition and was beneficial to the grantee, and her acceptance of the grant is presumed. If the plaintiff had destroyed the deed after his acceptance of it, this would not have operated to re-vest the title in Peters. Peters having sur-

Draper v. Rice.

rendered the title, and the defendant being the grantee named in the deed, and entitled to its possession, the manner in which she became possessed of the deed does not affect her title. *Eckerman v. Eckerman*, 55 Pa. St., 269; *Cincinnati, Wilmington and Delaware Railroad Company v. Iliff*, 13 Ohio St., 235; *Henrichson v. Hodgen*, 67 Ill., 179; *Hatch v. Bates*, 54 Me., 136.

II. From a careful examination of the testimony we are unable to find that the defendant agreed to surrender her claim to this property at the time of the settlement in November, 1876. The plaintiff knew that the defendant had the deed in her possession at this time. No allusion was made to this property in the settlement. Although the plaintiff executed to the defendant his notes for one thousand dollars, yet the evidence shows that he has not paid any part of them. He is insolvent, so that if the defendant loses this property, she will get nothing. The equities in favor of the defendant are not less persuasive than those in favor of the plaintiff. Upon the evidence submitted we think the court erred in setting aside the defendant's title.

REVERSED.

DRAPER V. RICE.

1. **Principal and Agent:** PROMISSORY NOTE: PAYMENT. Authority to sell property as agent, and take a note therefor in the name of the principal, does not include authority to receive payment of the note after it has been delivered to the principal.
2. **Promissory Note:** EVIDENCE TO VARY TERMS OF: PAYMENT. The maker of a note cannot show, as a defense thereto, that he has paid it to another than the payee, in accordance with a contemporaneous parol agreement, differing in its terms from the note.

Appeal from Linn Circuit Court.

SATURDAY, APRIL 23.

ACTION upon a promissory note for \$23. Defendant pleaded payment. Judgment for plaintiff. Defendant appeals.

56	114
85	549
56	114
92	99
56	114
105	515

 Draper v. Rice.

J. T. Rice and Geo. W. Wilson, for appellant.

Mills & Keeler, for appellee.

ADAMS, CH. J.—The note was made payable to the plaintiff, or bearer. It was given in part payment for a melodeon which was sold to the defendant as the property of the plaintiff. The trade was negotiated by one Jacobs, who took the note and delivered it to the plaintiff. Afterwards the defendant paid the amount of the note to Jacobs, but he did not get the note up because it was in the possession of the plaintiff. The payment was made on the strength of Jacobs' statement that he was the agent of the plaintiff and was authorized to collect the note, and would obtain it of the plaintiff and deliver it to the defendant.

Jacobs was not, in fact, the plaintiff's agent at the time of the payment, and plaintiff never received the money paid. The defendant, however, contends that while this may be so, he was justified in assuming that Jacobs was the plaintiff's agent, because the plaintiff in receiving the note had recognized him as such.

The precise question certified for our decision is in these words: "When the plaintiff, as payee, seeks to recover on the note, can the defendant, Rice, maintain his defense of payment made to the assumed agent, Jacobs, in pursuance of the agreement made by said agent to obtain the note, although the said agent was acting without authority, as shown in this case."

As showing that such defense can be maintained, the defendant relies upon *Eadie, Guilford & Co. v. Ashbaugh*, 44 Iowa, 519. But that case is not in point. It would, at most, only have the effect to show that the plaintiff, in accepting the note, made Jacobs his agent in the transaction out of which the note grew. But that agency would not, we think, extend to the matter of payment. Authority to sell a

Draper v. Rice.

piece of property as agent, and take a note for it in the name of the principal, would not, of itself, include the authority to receive payment. Had the note sued on been entrusted to Jacobs by plaintiff, although for some purpose other than collection, the case might be different.

It must be seen at once that the rule contended for would be a pernicious one. No person could, with safety, employ an agent to take a promissory note, if payment made to the agent at any time afterward were to be held payment to the principal, the agency having, in fact, been terminated, and the note remaining in the hands of the principal.

In our opinion the court did not err in rendering judgment for the plaintiff.

AFFIRMED.

SUPPLEMENTAL OPINION.

In a petition for re-hearing in this case, the appellant insists that the case cannot be distinguished from *Eadie, Guilford & Co. v. Ashbaugh*. It is said that when the opinion concedes that the acceptance of the note by the plaintiff had the effect to show that the plaintiff made Jacobs his agent in the transaction out of which the note grew, the opinion concedes, virtually, the appellant's whole position, for it is said that the evidence shows that in the transaction out of which the note grew, it was agreed between the defendant and Jacobs that the note should be paid in the use of livery to be furnished to Jacobs, and that it was so paid.

The note, by its terms, however, was made payable to the plaintiff in money. It is not allowable to show that by a parol contemporaneous agreement the note was not to be paid to the plaintiff in money, but to a different person, and in a different way.

In *Eadie, Guilford & Co. v. Ashbaugh*, the defendant set up a warranty for the machine for which the note was given. The only question was as to whether the warranty should be

2. PROMISSO-
BY NOTE :
payment :
evidence to
vary terms
of.

Conger v. Cook.

considered as made by the plaintiff's agent. If so, it was, of course, allowable to show it, whether made by parol or writing. The petition for a re-hearing must be overruled.

CONGER V. COOK ET AL.

1. **Administrator:** PETITION TO SELL REAL ESTATE: TIME OF FILING.

The fact that the petition of an administrator for authority to sell real estate for the payment of debts is not filed until some months after the expiration of the year for the filing of claims against the estate is sufficiently excused by a showing that the property could not have been sold sooner without great sacrifice.

2. —: —. Where the petition of an administrator for leave to sell real estate shows that there are unpaid claims established against the estate which the personal property is insufficient to pay, it is not subject to demurrer because it fails to show that all payments theretofore made by the administrator were proper and legal, that being a question alone between the heirs and the administrator and his bondsmen, which cannot be allowed to prejudice the right of creditors of the estate to speedy payment.

Appeal from Adair Circuit Court.

SATURDAY, APRIL 23.

THE plaintiff, as administrator of the estate of Charles Wilshire, deceased, filed a petition in the Circuit Court of Adair county, praying for an order for the sale of real estate, averring, in substance, that the personal property is inadequate to pay the debts and expenses of the administration. The petition showed that the plaintiff was appointed administrator Dec. 12, 1878, and gave notice of his appointment in the same month. The petition was filed June 11, 1880. It showed that the deceased died intestate, leaving as his widow Ina M. Wilshire, now Ina M. Cook, and the defendant William Wilshire, as his only child. These persons are made defendants, as being the owners of the property

56	117
94	644
56	117
128	107
56	117
144	76
144	77

Conger v. Cook.

sought to be sold. William Wilshire appeared and demurred to the petition. The demurrer was overruled, and he appeals.

H. E. Long and Charles S. Fogg, for appellant.

Ben. S. Adams and McCaughan & Dabney, for appellee.

ADAMS, CH. J.—The petition was filed about one year and five months after completed publication of notice of administration. The defendant Wilshire demurred upon the ground that it appeared that the application was barred by lapse of time.

1. ADMINISTRATOR:
petition to
sell real estate:
time of filing.

It is not claimed that there is any statute limiting the time of making an application for the sale of real estate, for the payment of claims, by an administrator, but it is contended that, on principle, the application ought to be denied unless made before the expiration of the time allowed by statute for establishing claims: that the statute allows one year for establishing claims, and the application was not made until that time had elapsed.

The plaintiff contends that, on principle, more time ought to be allowed for making an application to sell real estate for the payment of claims than is allowed for establishing claims, because an application to sell real estate for the payment of claims cannot be made until after the claims have been established, and, indeed, not until after the personal property has been exhausted, or the balance necessary to be paid by the sale of real estate has been ascertained.

The defendant, in support of his theory of limitation, cites and relies upon *McCrary v. Tasker*, 41 Iowa, 255 (260.) In that case Mr. Justice Day said: "We are disposed to hold that, as a general rule in this State, an application of the executor to sell real estate of the decedent for the payment of debts will not be sustained unless made within eighteen months

Conger v. Cook.

from the time the executor gives notice of his appointment, unless the peculiar circumstances of the case are of such a character as to make it the duty of the court of equity to depart from this general rule, and that, under such circumstances, the application must be made within a reasonable time." Under the statute then in force the time allowed for establishing claims was eighteen months.

In that case the application was made more than thirteen years after the appointment of the executor, and more than seven years after he was discharged. The court thought the application was made too late, and it was accordingly denied.

The plaintiff in the case at bar does not question the correctness of the decision in denying the application, but he contends very strenuously that the court not only had no occasion to fix a definite time within which application, as a general rule, must be made, but even if it had, that the time fixed is too short, and that the rule adopted is not sustained by the authorities.

The case at bar is not such as to require us to review the correctness of the doctrine enunciated in that case farther than this: we are of the opinion that if the general rule is that the time for making an application to sell real estate for the payment of claims expires when the time expires for establishing claims, matters of excuse for delay may not only be shown, but may be set up in the petition by which the application is made. In the case at bar a matter of excuse is thus set up. It is averred that the value of real estate was depreciated, and that there was no demand for, or opportunity to sell the same. It is averred, further, that both the plaintiff and the widow thought it would be injudicious to force the property upon the market earlier.

An administrator charged with the duty of selling real estate should exercise reasonable diligence to find a purchaser or purchasers, and to make a fair sale. For this purpose he may doubtless, if necessary, be allowed a little time, even though it should extend beyond the limit indicated. The

Conger v. Cook.

delay, if any, in this case was very small. No rights of third persons appear to have intervened. We are united in the opinion that the fact averred that there was no demand for the property or opportunity to sell the same sooner constituted a sufficient excuse, if any was necessary, for not making the application sooner.

As another ground of demurrer the defendant says that the petition is insufficient, because it shows that the plaintiff 2 —: —. has received money enough from the sale of personal property to pay all established claims, and that it is not necessary to sell real estate to pay them.

The petition shows that the administrator charged himself with \$4,766.66, as money received from the sale of personal property, which would be sufficient to pay the established claims, or nearly so. A portion of the property, however, was subject to a chattel mortgage, and the plaintiff credited himself with the payment of \$2,789.10, which payment was made at the time of the sale, and in satisfaction of the mortgage. This payment having been made the plaintiff's means were insufficient to pay all the established claims.

The defendant contends that the plaintiff is not entitled to the credit of paying the mortgage, because the claim secured by the mortgage was not an established claim, and that if this credit were stricken out he would appear to have sufficient means in his hands.

It appears from the petition that the property mortgaged was cattle; that the plaintiff applied for an order to sell them at private sale, averring among other things that the cattle were in a fit condition to ship for market; that they would depreciate in value unless sold, and that, as the plaintiff believed, they would sell for more at private than at public sale. Upon the petition so showing it appears that the court granted the order. It further appears that the cattle sold for more than enough to satisfy the mortgage upon them, and that enough of the purchase money to satisfy the mortgage was applied to that purpose.

Possibly to entitle the administrator to credit for the payment in his account as between him and the distributees he should show affirmatively that the mortgage was a valid and subsisting lien to the amount paid in discharge thereof. But no question of that kind can arise in determining the sufficiency of the application before us. It is shown that there are debts remaining unpaid, and that the administrator has not the funds to pay them. Suppose it were true as it is claimed that there has been a misapplication of funds; the loss should not fall upon creditors if the estate is sufficient. The loss should be borne by the administrator and his bondsmen, and this could be adjusted only upon final settlement. The administration must proceed until the debts are paid, or the estate exhausted. In our opinion the objection to the application based upon the use shown to have been made of the funds in discharge of the chattel mortgage is not well taken.

As another ground of demurrer it is said that the petition is insufficient because it shows that there is something due the administrator as costs of administration, and the application is made in part to raise money to reimburse the administrator, and also to pay him his compensation. The defendant contends that the real estate cannot be sold for such purpose.

If this were true we do not think that it would constitute a ground of demurrer to the petition which seeks an order of sale for the purpose of paying creditors. It was proper to grant an order of sale, though of course only for a legitimate purpose, and only for the sale of so much real estate as was necessary for such purpose. The petition, if objectionable upon the ground urged, should have been assailed, we think, by a motion to strike out the objectionable part.

We do not wish to be understood as intimating that we do not think that real estate can be sold to pay the administrator's costs and compensation, where the proceeds of the personal property have been exhausted in properly paying creditors.

The petition in this case was assailed by demurrer. The

Darland v. Rosencrans.

demurrer was overruled, and the order of sale made. Let the order stand; it will be time enough to adjust the administrator's account, and determine the question, when he comes to ask the approval of his account, and the allowance of his compensation.

AFFIRMED.

DARLAND V. ROSENCRANS.

1. **Evidence: TIME OF INTRODUCTION: PRACTICE.** A court may, in its discretion, allow the introduction of evidence after the arguments of counsel have been concluded.
2. **Sale: FRAUD: INSTRUCTIONS.** Instructions in an action to set aside a sale on the ground of fraud considered and approved. ADAMS, CH. J., *dissenting*.
3. ———: ———: **PARTNERSHIP.** The purchase by one partner of his co-partner's interest in the firm property is not rendered void for fraud because of the fact that the buyer has knowledge of his partner's insolvency, if he has no reason to suppose it is the latter's intention to defraud his creditors by the sale.

Appeal from Floyd Circuit Court.

SATURDAY, APRIL 23.

THE plaintiff is a judgment creditor of one William Wade. As such, he seeks to reach a certain alleged interest of Wade in a stock of goods in the possession of the defendant Rosencrans. For that purpose he garnished Rosencrans and took his answer. The answer showed that at one time Wade was in partnership with Rosencrans, and that the stock of goods at that time belonged to the firm, but that, on the 13th day of August, 1877, Rosencrans bought out Wade, paying him for his interest in the stock \$800, of which sum \$600 was paid in cash and \$200 in the cancellation of previous indebtedness due from Wade to Rosencrans. On this answer the plaintiff took issue, averring that the pretended

Darland v. Rosencrans.

purchase was void, as having been made with intent to defraud Wade's creditors. There was a trial by jury, and verdict and judgment were rendered for the defendant garnishee. The plaintiff appeals.

Starr, Harrison & Danforth, for appellant.

J. E. Owens and *J. S. Root*, for appellee.

DAY, J.—I. The plaintiff introduced as a witness one S. E. Shephardson, who testified that he was a banker, and that the defendant Rosencrans borrowed some money from his bank about the time of the alleged purchase. He was then asked if he recollected having a conversation with Rosencrans as to what he wanted to do with the money, and he answered that he did not. He was then asked a question in these words: "Did you tell me that you were present and loaned that money to Rosencrans that night?" To this question the defendant objected as incompetent and improper, and the court sustained the objection. The ruling sustaining the objection the plaintiff assigns as error.

In no possible view can we see how it was material what the witness told the plaintiff's counsel. We infer from the counsel's argument that he hoped, when he put the witness upon the stand, to show that Rosencrans, when he obtained the money, made some damaging admissions to the witness; that upon examination of the witness he found he was mistaken, and concluded that the admissions must have been made to the plaintiff's partner, whose testimony he might have had if he had not been misled by the witness. But suppose the counsel had been permitted to show that he had been misled by the witness, the jury would, not have been justified in inferring that the admissions could have been proven by some other witness, and, therefore, that they were made.

II. The defendant offered in evidence a bill of sale of the

 Darland v. Rosencrans.

property in question, executed by Wade to the defendant.

1. EVIDENCE:
time of intro-
duction: prac-
tice.

The plaintiff objected upon the ground that the evidence had been closed and the arguments made. The court overruled the objection and the plaintiff assigns the overruling thereof as error.

We see nothing to show that the evidence had been closed and the arguments made at the time this bill of sale was introduced, except so far as appears from the plaintiff's objection, which is insufficient. Besides, the court, in its discretion, might allow its introduction even though offered after the evidence was supposed to be closed and the arguments had been made.

III. The court, at the request of the defendant, gave an instruction in these words:

"3d. Persons who are in debt, and even persons who are insolvent, must be allowed to sell property as well as others, and if they sell for full value for cash, or for cash and a pre-existing debt, there is nothing in such a transaction alone to indicate fraud." The giving of this instruction the plaintiff assigns as error.

He claims that the instruction was calculated to mislead the jury, because there was no question as to any one being in debt. Yet the whole theory of the plaintiff's case is that the alleged sale was made to defeat the plaintiff in collecting his debt against Wade, and that the plaintiff ought to be allowed to collect his debt out of the stock, notwithstanding the sale.

It is further objected to the instruction that it was calculated to lead the jury to think that a sale for full cash value would not be fraudulent, whatever the other circumstances might be.

But the instruction says that such sale would not *alone* indicate fraud; and negatives, by plain implication, what the plaintiff contends that the jury might have inferred.

IV. The court, at the request of the plaintiff, gave an instruction in these words:

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"4th. The fact that a suit is pending against a person does not prevent him from selling his property and giving a good title thereto." The giving of this instruction the plaintiff assigns as error.

The objection made to it is that it only partially states the law. But it would not necessarily be erroneous, or mislead the jury, for such reason. The instruction, taken in connection with other instructions given, we think is unobjectionable.

V. The court, at the request of the defendant, gave an instruction in these words:

"8th. Partners have peculiar relations to each other and either of the partners is always justified in purchasing the interest of the other, whenever he believes that his material interests will be improved or his financial credit will be saved or that his general reputation will be saved or improved, if in the purchase he is actuated alone by these considerations without regard to the fact that he is indebted beyond his individual means to pay, and that the purchasing partner may know of the indebtedness; under the above circumstances a sale from one to the other is not fraudulent." The giving of this instruction is assigned as error.

In our opinion, a purchase is not necessarily to be deemed to be made in bad faith where a partner purchases of an insolvent copartner and with knowledge of the insolvency. This seems to us to be the rule enunciated in the instruction. It is true it emphasizes to some extent the motive which a partner may have to purchase of his co-partner, but we do not think that that necessarily vitiates the instruction. If the partner is induced to purchase solely by a regard for his own interest, so far the purchase would be an honest one and it would not be rendered fraudulent simply by knowledge of the seller's insolvency.

It is true if the purchaser has knowledge of a fraudulent intent on the part of the seller no exigency on the part of the

Darland v. Rosencrans.

purchaser will prevent the purchase from being regarded as fraudulent. The instruction complained of, while it does not recognize this rule, does not necessarily contravene it. It recites certain circumstances and proceeds to say that "under the above circumstances a sale from one to the other is not fraudulent." Possibly if the instructions stood alone, we might deem it objectionable for want of fullness. But it is helped out, we think, by an instruction which the court gave on its own motion, and which is in these words:

"14th. But if Wade sold his interest in the firm property with intent to defeat, delay or defraud his creditors, and if the defendant, at the time or before he purchased Wade's interest *had notice of this intent*, defendant would not have been a purchaser in good faith and his purchase would be fraudulent and void as to plaintiff's attachment."

We think that the instruction complained of, taken in connection with this instruction, is unobjectionable.

VI. The Court, at the request of the defendant, gave an instruction in these words:

"9th. The position of the parties to this transaction, that is, the position of the vendor, Wade, and Rosencrans, as partners, can be considered by the jury in determining whether there was honesty of intention and purity of purpose in the acts of the defendant, Rosencrans." The giving of this instruction the plaintiff assigns as error. He insists that the fact that the parties to the sale were partners had no tendency to evince honesty on the part of Rosencrans.

Where a person purchases property of such a character or under such circumstances as to make the transaction a strange and unnatural one, it constitutes, doubtless, a circumstance which the jury is entitled to consider in determining whether the purchase was made in good faith. If this is so, it appears to us that the jury may be allowed to consider any circumstance tending to show that the transaction was not a strange or unnatural one. The fact that the parties to this sale were partners is not, to our mind, an important one, and

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yet we are not prepared to say that there was error in instructing the jury that they might consider it. If either partner wanted to dissolve partnership for any reason it might be naturally expected that one would buy out the other, and if one had the ability to buy and the other had not, the one who had the ability would naturally become the buyer.

VII. The Court, upon its own motion, gave two instructions which are in the following words:

"11th. A member of a firm or co-partnership is justified in purchasing the interest of his partner in the firm property, a. —; —; although suits may be pending against the partner from whom he purchases to the knowledge of the purchasing partner, if the purchase is made in good faith, and a purchase so made would be valid as against the creditors of the selling partner.

"12th. But if the purchase is not made in good faith; if the selling partner sells for the purpose of hindering, delaying, or defrauding his creditors, and the purchasing partner knows of this purpose at the time of the purchase, he would not be a purchaser in good faith, and his purchase in such case would be fraudulent as against the creditors of the selling partner, and void as to them."

The giving of these instructions is assigned as error. The objection made is that they imply that positive knowledge by the buyer of a fraudulent intent on the part of the seller is necessary to render the sale fraudulent, whereas it is sufficient if the buyer had such knowledge as should put him upon inquiry.

Conceding, as plaintiff claims, that the defendant should be deemed to have had knowledge of the fraudulent intent, if he had such knowledge as should have put him upon inquiry, still we do not think that the instructions contain reversible error. The rule enunciated is correct, the only objection being that they do not fully instruct the jury as to what they might find to be knowledge. We think that if the plaintiff

Kendrick v. Eggleston.

desired a more explicit instruction upon this point he should have asked it.

VIII. The plaintiff complains that the verdict is contrary to the evidence. We are free to say that we think that the jury might more properly have found for the plaintiff, but we cannot say that the verdict is wholly without support, and the judgment must be

AFFIRMED.

ADAMS, CH. J., *dissenting*. I think that the counsel for the defendant, in drawing and asking the 8th instruction designed that the jury should be led to believe that a partner may always purchase from his co-partner when he thinks that his interest requires it. I think that the instruction was well calculated to lead the jury so to believe. If so, it is erroneous, and the error was not cured by the giving of another instruction which contravened it, and expressed the correct rule, because one instruction is as authoritative as another.

KENDRICK ET AL V. EGGLESTON ET AL.

1. **Vendor's Lien: WAIVER OF: TAKING OF OTHER SECURITY.** Where the vendor of real estate took in part payment therefor the secured note of a third person, indorsed by the vendee, it was held that he thereby waived his right to a vendor's lien, though the security taken afterward proved worthless, it being considered good by all the parties at the time it was taken.
2. **Practice in the Supreme Court: TRIAL *de novo*: WAIVER OF IRREGULARITY.** After having argued a case on appeal to the Supreme Court as though it were triable *de novo*, an appellee cannot in a reply, upon purely technical grounds, insist that it is not so triable.

Appeal from Davis Circuit Court.

SATURDAY, APRIL 23.

THIS is an action for judgment against the defendant, Caroline Eggleston, as the indorser of a note, and to establish a

Kendrick v. Eggleston.

vendor's lien upon certain property in the petition described. At the April term, 1878, judgment was rendered against the defendant Caroline Eggleston for \$2,753.30, and a vendor's lien was established upon her interest in said land. As to the other defendants the cause was continued. At the April term, 1880, the cause came on to be heard as to the other defendants, when the court rendered a decree establishing a vendor's lien against the interest of the defendants Clara and Louisa Schilling, in said land, for the sum of \$800. From this decree the defendants Clara Schilling and Louisa Schilling appeal. The material facts are stated in the opinion.

Traverse, Payne & Eishelberger, for appellants.

M. H. Jones & Son, and *Trimble, Carruthers & Trimble*, for appellees.

DAY, J.—I. The defendant Caroline Eggleston, formerly Caroline Schilling, bought the land now in controversy from Jeremiah Eggleston, for the sum of \$4,400. She paid for the land in money and by the transfer of certain notes, amongst which was a note on John Zulauff for \$3,000, on which \$1,000 had been paid, which note she indorsed in blank. Jeremiah Eggleston deeded the land to Caroline Eggleston and her two minor children, Clara and Louisa Schilling. At the time this deed was made Caroline Eggleston owned over six thousand dollars worth of property in her own right, which she obtained from her former husband, and was not in debt. Afterward Jeremiah Eggleston traded the Zulauff note to the plaintiff, William Kendrick, for land and stock, and Kendrick's own note for \$359. The Zulauff note was secured by a mortgage on land and mill property. At the time of these transactions all the parties to the sale and transfer of the Zulauff note considered it good, and the maker solvent. The Zulauff mill property was, in fact, incumbered by a judgment which was prior to the lien of the Eggleston mortgage. Zulauff proved to be insolvent, so

1. VENDOR'S
lien : waiver
of : taking of
other securi-
ty.

Kendrick v. Eggleston.

that only about \$150 was realized from him on said note. Under these facts the plaintiffs claim that they are entitled to a vendor's lien upon the property which was purchased in part by a transfer of the Zulauff note. If the plaintiffs are entitled to a vendor's lien, it is upon the ground that Jeremiah Eggleston acquired such a lien, which passed to the plaintiffs by the transfer of the Zulauff note. It is a general doctrine of equity that the vendor of real estate retains a lien upon the property sold, for the unpaid purchase money, unless it appear from the circumstances of the case that the lien was waived. It is also a general principle that the taking of distinct security, whether of real or personal property, is evidence that the seller did not repose upon the lien, and discharges the lien. It is also said that the sounder doctrine, and the higher authority, is that taking the responsibility of a third person for the purchase money is taking security, and discharges the lien. 4 Kent, § 153.

In leading cases in equity it is said: "It may be considered as settled by the unanimous concurrence of the cases in this country, that wherever this lien is recognized at all it will not be affected by the vendor's taking the bond or bill single of the vendee, or his negotiable promissory note, or a check drawn on a bank by the vendee, which is not presented or paid, or any instrument whatever, involving merely the personal liability of the vendee; but that taking a mortgage of other property or the bond or note of the vendee with a security, or a negotiable note drawn by the vendee and indorsed by a third person, or drawn by a third person and indorsed by the vendee, will repel the lien presumptively."

That the taking of security is *prima facie* a waiver of the lien, see 2 *Washburn Real Property*, 9; *Vail v. Foster*, 4 Coms., 312; *Fish v. Howland*, 1 Paige, 20; *Traill v. Smith*, 2 Mich., 243; 4 *Waits Actions and Defenses*, 323; *Boyton v. Champlain*, 42 Ill., 57; *Landers v. McAfee*, 41 Ga., 684; *Durette v. Briggs*, 47 Mo., 356; *Yaryan v. Shrener*, 26 Ind., 364; *Schurz v. Stein*, 27 Id., 112; *Brown v. Gilman*,

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4 Wheat, 253; *Burke v. Gray*, 6 Howard (Miss.), 527; *Campbell v. Baldwin*, 2 Humph., 248.

It is true as held in *Garson v. Green*, 1 Johns. Ch., 309, that *prima facie* the purchase money is a lien upon the land, and it rests upon the purchaser to show that the vendor agreed to rest on other security. But, when it is shown that other security was taken, the presumption that a lien was intended is rebutted, and the burden of proof is then cast upon the vendor to show that a waiver of the lien was not intended. The plaintiff relies upon *Cordova v. Hood*, 17 Wallace, 1. In this case the purchaser executed for the purchase money his own note secured by his son. There was evidence showing clearly that neither party understood the note to be taken as a substitute for the lien. It was said by the court that the taking of a note or bond from the vendee with a surety has generally been held evidence of an intention to rely exclusively upon the personal security taken, and, therefore, presumptively to be an abandonment of the lien, but that this raises only a presumption, open to rebuttal by evidence that such was not the intention of the parties. The case of *Wilson v. Lyon*, 51 Ill., 166, also cited and relied upon by the appellee, is one where a vendor's lien clearly existed at the time of the sale, which it was held was not displaced by the subsequent assignment of a policy of life insurance, the proof showing that the assignment was not taken as independent security. Most of the other cases cited by appellee hold simply that the acceptance of a note of a third person for goods does not constitute payment unless so agreed, and that payment in forged or worthless paper does not satisfy a debt. It is evident that these cases are not applicable to the question of a waiver of a vendor's lien by taking collateral security.

The plaintiff insists that the presumption of waiver arising from the taking of collateral security is rebutted by the fact that the security was worthless. In support of this position appellee cites *McDole v. Purdy*, 23 Iowa, 277. That was a case of the exchange of lands, in which the de-

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vendant made false and fraudulent representations as to the quality, situation, character and value of the land conveyed to plaintiff, on account of which it was found that the purchase price of the land conveyed by plaintiff was, in part, unpaid, and that, to that extent, the plaintiff was entitled to a vendor's lien. There was no fraudulent representation in this case. All parties supposed the security was good at the time of the purchase from Jeremiah Eggleston. The lien is claimed simply from the fact that the security afterward proved to be worthless. If this is a ground for enforcing a vendor's lien, it follows that the lien may always be enforced, notwithstanding the taking of collateral security, whenever such enforcement becomes necessary for the protection of the vendor. No such doctrine as this is recognized by the cases upon the subject. The court, in our opinion, erred in the establishing of a vendor's lien.

II. In their reply the plaintiffs for the first time call our attention to the fact that this case is not triable *de novo*, because

2. PRACTICE
It the supreme
court: trial
do novo:
waiver of ir-
regularity.

the court below certified that the record contains all the evidence introduced, but does not certify that it contains all the evidence offered.

It is claimed the case falls within the principle of *Taylor v. Kier*, 54 Iowa, 645. The case was submitted upon appellants' abstract, and upon an agreed amended abstract of appellees. In the opening argument of appellees the case is discussed upon its merits, as though triable *de novo*. It is evident from the manner in which the case has been presented that the record does in fact contain all the evidence offered, and that the objection raised in the reply is merely technical. Such objection should have been raised upon the threshold, and ought not to avail when presented for the first time in the reply. The judgment of the court below is

REVERSED.

 Zimmerman v. National Bank of Winterset.

ZIMMERMAN V. NATIONAL BANK OF WINTERSET.

56	138
93	691
56	138
116	700
117	434
56	138
125	490

1. **Judgment:** REVERSAL OF: RESTITUTION FOR PROPERTY SEIZED UNDER. Where property has been taken and sold under an execution issued upon a judgment which is afterward reversed by the Supreme Court, it is the duty of the party taking such property to make restitution therefor upon reversal of the judgment, and if not done the execution defendant may at once maintain an action, without demand, to recover the damages sustained by reason of such taking.

Appeal from Madison Circuit Court.

SATURDAY, APRIL 23.

THE plaintiff filed a petition claiming of the defendant one thousand dollars, and stating as a cause of said claim that in 1878 and 1879 Robert Eyre was in possession of certain real estate and had thereon a large quantity of grain; that defendant by its agents broke and entered upon said premises and destroyed and took therefrom grain and standing corn of the value of one thousand dollars, which was either destroyed or converted to the defendant's own use; that all of Robert Eyre's rights have been transferred to the plaintiff by written assignment. A copy of the assignment is incorporated in the petition and is as follows: "For value received I hereby assign and transfer unto R. H. Zimmerman all my claim for damages against the National Bank of Winterset growing out of the issue and levy of execution against my property in the case of said bank in the Circuit Court of Iowa for Madison County Iowa, on judgment rendered by said court, but since reversed by the Supreme Court of Iowa."

The defendant filed a demurrer to the petition, which was sustained. The plaintiff failing to plead further, judgment was rendered against him for costs. The plaintiff appeals.

Wainwright & Miller, for appellant.

John Leonard, for appellee.

DAY, J.—The grounds of the demurrer which the court sustained are as follows:

"2. The said facts do not entitle the said plaintiff to any relief whatever.

"3. That it appears from and by said petition that the acts complained of were done under and by virtue of legal process of the court in which this action is instituted and now
 1. JUDGMENT: pending, to-wit, a writ of execution. And it does
 reversal of :
 restitution not appear that either the said plaintiff or the said
 for property
 seized under. Robert Eyre ever asked or demanded reparation or restitution for the supposed injury done.

"4. When the act of a defendant was lawful and right at the time it was done, circumstances subsequently arising cannot make it unlawful so as to create a cause of action without demand of restitution or reparation by the party claiming to have been injured by the act."

Section 3198 of the Code provides: "If by the decision of the Supreme Court the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the Supreme Court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to such appellant his property or the value thereof." In *Hanschild v. Stafford*, 27 Iowa, 301, it was held that this section was designed merely to afford a cumulative and summary remedy, and that a party may resort to the ordinary suit for redress. It is insisted by the appellee that the seizure was under due process of the court and rightful in its inception, and that no subsequent event can render that act wrongful. This may be admitted. But the moment that the judgment under which the defendant acted was reversed, it became the legal duty of the defendant to restore to the plaintiff all property, or the value thereof, taken under the judgment. The continuing to hold the property after the reversal of the judgment was without legal authority, and wrongful, and rendered the defendant liable to an action. No demand of

Morris v. The Union Pacific R. Co.

restitution was necessary to determine the lawfulness of the defendant's possession. That was done by the reversal of the judgment under which the defendant seized the property. It is only in cases where a demand is necessary to the creation of the plaintiff's right that it is necessary to allege a demand, as in the case of a bailee, whose right to possession continues until demand, and in like cases. Van Santvoord's Pleadings, vol. 1, page 276. Under the common law form of procedure this action would have been *assumpsit*, upon the implied promise to pay the reasonable value of the property taken, or *case*, for the breach of the legal duty to make restitution. In neither action is proof of demand essential to the right of recovery. Under our system of pleading no allegation need be made which is not required to be proved. The second ground of demurrer is too general and cannot be considered.

REVERSED.

MORRIS V. THE UNION PACIFIC R. CO.

1. **Jurisdiction: ACTION AGAINST NON-RESIDENT DEFENDANT: ATTACHMENT.** Where in an action against a non-resident defendant, which was commenced by attachment served by garnishing a supposed debtor of the defendant, and the defendant was served by publication only, the answer of the garnishee showed that it was not indebted to the defendant at the time of the service of the attachment, it was held that the court acquired no jurisdiction to proceed in the action, though such answer disclosed an indebtedness to the defendant at the time it was made

Appeal from Pottawattamie Circuit Court.

SATURDAY, APRIL 23.

THE Union Pacific Railroad Co. was garnished as the debtor of the defendant in this action, S. B. Jones, and upon its answer judgment was rendered for plaintiffs. The garnishee appeals. Other facts of the case appear in the opinion.

Morris v. The Union Pacific R. Co.

A. J. Poppleton, J. M. Thurston, Wright & Baldwin
and *C. J. Green*, for appellant.

Charles Ogden and R. E. Montgomery, for appellee.

BECK, J. I. The cause was submitted to this court upon an agreed statement of facts, the material portions of which are in substance as follows: The garnishee, the Union Pacific Railroad Company, is a corporation organized under an act of congress and operates a railroad terminating at Council Bluffs, in this State, where it has agents. On the 4th day of June, 1879, plaintiff commenced this action by attachment upon the record of a judgment rendered in Nebraska, alleging in his petition that the defendant was a non-resident of the State, and praying for an attachment against his property. On the 5th day of June the Union Pacific Railroad was served with garnishment process, and, on the 18th day of April, following, filed its answer stating that at the date of the service of garnishment process it owed defendant nothing, but on the day of answering it owed him \$155, and defendant was, when process was served, and continues to be, in the service of the railroad company. It further states in its answer that it has no property or credits of defendant, within the State of Iowa; that the sum of \$155, shown to be due defendant from the railroad company, was earned by him as a clerk in the garnishee's employment in Nebraska, at the wages of \$125 per month, and that sum owed to him by plaintiff is due him there, and is not payable in this State, and that the sum due defendant is in the State of Nebraska and not in Iowa. It is further shown that as defendant, Jones, is a married man, the credits in the garnishee's hands are exempt from attachment or execution under the laws of Nebraska, and that no service of process has been had upon defendant. The garnishee in its answer denies jurisdiction of the Circuit Court over the credits in its hands in favor of defendant.

Service of notice was made upon defendant by publication

Morris v. The Union Pacific R. Co.

and he did not appear to the action. Judgment was rendered against him by default.

The cause was continued as to the garnishee and another writ of attachment was issued and garnishment process was again served upon the railroad company. On the first day of February, 1880, it answered to the second garnishment process, alleging that it is not indebted to the defendant, and was not when the last process was served upon it; that the defendant was in the employment of the garnishee at that time and continues therein, and that his earnings to the date of the service of the last garnishment process, from August 7th, 1879, was \$700, which the garnishee paid at the date last mentioned. Judgment was rendered against the garnishee for \$271, the amount of plaintiff's judgment, and interest and costs.

II. It cannot be disputed that, in order to give the court below jurisdiction, there must have been property seized upon the attachment issued in the case, for the reason that the service of notice in the case was by publication. The garnishment of a debt due the defendant, it may be admitted, would be a seizure of property on the attachment. If, therefore, it appears in this case that a debt due defendant was seized by the garnishment process, the court acquired jurisdiction, but as there was no seizure of property on the attachment, if it appears that there was no seizure of a debt due defendant the court did not acquire jurisdiction.

It will be observed that the garnishee, in its first answer, shows that when the first attachment and garnishment process was served, it owed defendant nothing. This answer, being uncontradicted, must be taken as true. There was, then, no debt owing by the garnishee to defendant; the attachment by means of the garnishee process reached and seized nothing. The court, therefore, acquired no jurisdiction by the first attachment. It cannot be claimed that the writ first served would operate to seize and subject debts to become due after the service of the attachment, which seized nothing, neither debts

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nor other property of the defendant. To give the court jurisdiction something must be seized when the attachment by means of the garnishment process is served. If nothing is so seized the court does not obtain jurisdiction, either of defendant, the garnishee, or of property of defendant not seized. It will not, therefore, do to say that a debt to defendant accruing after the service of the attachment, which did not exist when the attachment was served, is made subject to the garnishment process, and that the garnishee is to be held liable for debts accruing after service of the attachment. Had a debt existed at the time of service, so that jurisdiction attached to defendant and the garnishee, the latter, under the statute which binds him not to pay over property or money of defendant which may come into his hands, would have been liable for debts subsequently contracted. But as no such debt existed, no jurisdiction was acquired over debts subsequently accruing. These views sufficiently dispose of plaintiff's claim based upon the first attachment; we hold that the court acquired no jurisdiction thereunder.

III. The case is equally plain as to the second attachment. It is shown by the answer of the garnishee, which is not contradicted, that when the second writ and garnishment process were served upon the garnishee he owed defendant nothing; that he had been fully paid for all services he had rendered up to the date of the services of the garnishment process. As in the case of the first writ, the garnishment process last issued seized no debt, for none existed. The court, therefore, acquired no jurisdiction of the defendant and of the garnishee to hold the latter subject to plaintiff's claim against defendant.

It is our opinion that under the facts of the case the Circuit Court erred in rendering the judgment against the garnishee; it is, therefore,

REVERSED.

Yokom v. McBride.

YOKOM V. MCBRIDE.

56	139
117	230
56	139
126	723

1. **Contract: BREACH OF: PRACTICE.** In an action to recover the consideration paid for certain lands which the defendant contracted to have patented to the plaintiff by a specified date, but which were not so patented, the defendant alleged that he had assigned to the plaintiff a certificate which in fact conveyed the title to the lands and right to a patent: *Held*, that the issue presented by such allegation should have been submitted to the jury, and if the facts were found to be as alleged that the plaintiff could not recover without returning or offering to return such certificate.
2. —: —: **MEASURE OF DAMAGES.** The measure of damages for the breach of a contract to convey land, where it occurs without the fault of the vendor, is the consideration paid him for the land, with interest, but if the failure occurs through his fault the vendee may recover such consideration, or the value of the land at the time the conveyance should have been made, if greater than the consideration paid.

Appeal from Marshall Circuit Court.

SATURDAY, APRIL 23.

ACTION at law. There was a verdict and judgment for plaintiff. Defendant appeals.

B. L. Burritt and Henderson & Carney, for appellant.

J. M. Parker and Brown & Binford, for appellee.

BECK, J.—I. The petition declares upon an obligation in writing in the following language:

“On or before the first day of February, 1880, I agree to furnish Carrie E. Yokom a patent from the State of Texas to the following described real estate, situated in Hale county, Texas; Survey No. 25, block No. D, 6, 640 acres of land on the waters of White Reall Creek, a tributary of the Brazos River, about seven miles east from center of county, beginning at a mound, the southwest corner of Survey No. 22, in same block; thence S. 1900 ves a mound; thence E. 1900 ves a mound; thence N. ves a mound, the southeast corner of said

Yokom v. McBride.

survey No. 22; thence west 1900 ves to place of beginning. And for the faithful performance hereof I bind myself, my heirs, administrators and assigns firmly by these presents, in the penal sum of seven hundred dollars.

“W. S. McBRIDE.

“Marshalltown, Iowa, October 20, 1879.”

It is alleged that on the 2d day of March, 1880, the plaintiff demanded of defendant the deed or patent described in the obligation, which has not been delivered; “that plaintiff paid defendant \$700, in land, which was understood and agreed to be the value of the land described in the obligation, and defendant agreed to furnish the plaintiff a good title to the land, and represented that the patent which he obligated himself to procure would give plaintiff a perfect title. Plaintiff seeks to recover \$700, the amount named in the bond. The defendant in his answer alleges that, being the owner of the certificate of the entry of the land described in the obligation sued upon, he sold and transferred it to plaintiff in exchange for other land; that the trade was completed before the execution of the instrument in suit, and the certificate being duly assigned to plaintiff vested her with the right to the patent for the land; that afterwards without any consideration, and as a gratuity, defendant agreed to procure a patent for plaintiff and thereupon executed the instrument in suit; that he took proper steps to procure a patent, which will be issued in the due course of the business of the officer authorized to convey the land.

Another count of the answer alleges that defendant sold and assigned to plaintiff a certificate of the entry of the lands described in the obligation, which vested in her title to the land and a right to the patent; that defendant agreed to forward the certificate and procure a patent to be issued thereon and to secure the performance of this agreement he executed the obligation sued upon; that defendant did forward the certificate to the proper land office in Texas, and it was duly filed therein and a patent will be issued in due course of the

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business of the office, and that the assignment of the certificate to plaintiff still remains in force and the plaintiff is entitled to a patent to the land described in the obligation in suit.

II. The answer of defendant sets up that plaintiff acquired title to the land and a right to the patent by the assignment
 1. CONTRACT: and transfer of a certificate, upon which defendant
 breach of :
 practice. obligated himself by the instrument sued upon to procure a patent. It cannot be disputed that if plaintiff acquired either the title to the land or a right to the patent she cannot recover the consideration paid defendant, or the value of the Texas land, and continue to hold the title or the right to the patent. To entitle her to recover on the obligation, under the facts pleaded, the sum she paid defendant or the value of the Texas lands, she should either return or offer to return the certificate and restore defendant to the rights he held, and to the position he occupied before the transfer to her of the certificate. This conclusion is based upon familiar rules of the law. See *Seevers, Admin'r, v. Hamilton*, 6 Iowa, 199. Now the answer raises an issue involving plaintiff's title to the land and right to the patent held by her. This issue was not determined upon the trial in the court below and the cause seems to have been tried without reference thereto. There was evidence applicable to it. If it be found that plaintiff still retains the title to the Texas land and the right to a patent, her damages cannot be the value of that land nor the value of the consideration she paid defendant. It would be the loss she sustains by reason of the failure to deliver the patent at the time specified in the defendant's obligation. To entitle her to recover the damages first named, she must show that she has returned or offered to return the certificate, and has restored defendant to the position he occupied before it was assigned to her.

The court instructed the jury that if they found the instrument sued upon is based upon a consideration, defendant is liable for the value of the land received by him from plaintiff, not exceeding the penalty of the obligation sued on, \$700.

Yokom v. McBride.

This instruction ignores the issues we have just specified. These issues should have been determined at the trial and the jury should have been instructed as to matters involved therein which they were required to consider.

III. The petition alleges that defendant undertook to procure for plaintiff the title of the Texas land. It shows 2. —: —: a purchase of the land and payment therefor, and ^{measure of} damages. that plaintiff has failed to obtain the title thereto. The answer alleges that plaintiff has acquired the title to the land and the right to the patent. The issue thus presented involves not the failure of title, but the failure of defendant to cause the title to be conveyed to plaintiff. If this issue be found for plaintiff, and it appears that defendant was prevented, without fault on his part, from conveying the title, plaintiff is entitled to recover the consideration paid defendant, with interest. If the failure to convey was through the fault of defendant the plaintiff may recover the increased value of the land at the time the conveyance should have been executed. *Foley v. McKeegan*, 4 Iowa, 1. The rule last stated contemplates that the increased value of the land is greater than the consideration paid by the plaintiff. In case the defendant has the ability to convey the land and refuses to do so, the plaintiff may recover its value. *Devin v. Himer*, 29 Iowa, 297. These cases do not hold that, if the value of the land sold be less than the consideration paid, the plaintiff can be limited in recovery to the value of the land. The value of the land is the measure of damages when it exceeds the value of the consideration, and the conveyance is not made through the fault of defendant. If defendant is in fault plaintiff is entitled to recover substantial damages, which would be the value of the land if it be greater than the value of the consideration paid therefor. But if the value of the land be less than the consideration paid, the plaintiff's measure of damages will be the value of the consideration. These rules are supported by the cases just cited and are in accord with reason and justice. They will guide the Circuit Court

Boswell & Tobin v. Gates.

when the cause is again submitted for trial. The rule of damages announced in the instructions, as applicable to the issues and theory upon which the case was tried, and the facts, is not erroneous. But as we have seen, an important issue was overlooked by the court and was not considered in the trial. For this cause the judgment must be reversed. Other questions discussed by counsel need not be considered.

REVERSED.

56 143
110 544

BOSWELL & TOBIN V. GATES ET AL.

1. **Practice:** ACTION OF TORT: JOINDER OF DEFENDANTS. In an action to recover for a tort, in which two are joined as defendants and it is alleged that the tort was committed by them jointly, the jury may find that it was committed by one defendant alone, and judgment may properly be rendered against him therefor.

SATURDAY, APRIL 28.

Appeal from Palo Alto Circuit Court.

THIS action was brought before a justice of the peace. The plaintiffs aver that they are livery stable keepers; that as such they furnished to the defendants, L. S. Gates and wife, a team of horses to drive before a buggy to another county; that by reason of their careless and improper driving and treatment of the horses one of them was injured. They bring this action to recover damages in the sum of eighty dollars. There was a trial by jury and verdict against the defendant L. S. Gates, alone. Before judgment the defendant L. S. Gates moved to dismiss the action on the ground that a joint tort was averred and not proven. The motion was overruled, and therefore the defendant L. S. Gates, to test the correctness of the ruling, sued out from the Circuit Court a writ of error and the ruling was by the Circuit Court reversed. The plaintiffs appeal.

Boswell & Tobin v. Gates.

George H. Carr, for appellants.

T. W. Harrison, for appellee.

ADAMS, CH. J.—The question certified is in these words: "In a joint action of tort against two defendants, where the jury find in favor of one and against the other, is the plaintiff entitled to judgment against the one against whom the verdict was rendered?"

1. PRACTICE:
action of tort:
joinder of de-
fendants.

The defendant insists that this question must be answered in the negative. He relies upon *Cogswell v. Murphy et al.*, 46 Iowa, 44; and *Barnes & Son v. Ennenga*, 53 Iowa, 497.

The former was an action brought against three defendants jointly for trespass and damage caused by their cattle. Against the defendants separate judgments were rendered on the ground that each was liable for a separate tort. It was held that this was error, Mr. Justice Seevers in rendering the opinion saying that the plaintiff was entitled to a joint judgment or nothing,

But the principle involved in that case is different from that involved in this. The court could not properly render separate judgments against the defendants for separate torts committed by each, nor was it for the court to make an election of one of the defendants and render a judgment against him. In the case at bar there was but one tort, and the only objection to the rendition of judgment against L. S. Gates is that it is averred that the tort was committed jointly by him and his wife, who is made co-defendant with him, which averment, so far as the joint character of the tort was concerned, was not proven.

It is true that in *Barnes & Son v. Ennenga et al.*, above cited, the writer of this opinion said in writing the opinion in that case: "A joint tort having been averred it was incumbent upon the plaintiffs to show a joint tort. If they failed, no judgment of any kind should have been rendered." An examination of the opinion, however, will show that this

Wightman v. Spofford.

was said upon a point not raised, and not necessary to the decision. As applied to a case like that of *Coswell v. Murphy*, above cited, the remark would be unobjectionable, but it is not to be approved as an unqualified proposition, and in no view can it be regarded as authority.

The rule undoubtedly is, that where a verdict for damages for tort is rendered against one defendant only, judgment may be rendered thereon, although other persons may have been joined as defendants under an averment that the tort was committed by all the defendants jointly. *Carrothers v. Van Hogan*, 2 G. Greene, 481.

The appellee, however, insists that no error of the court, if any, can be reviewed, because error is not properly assigned.

The error as we hold consisted in reversing the judgment of the justice of the peace in ruling upon the writ of error. This error, we think, is assigned as specifically as it may be.

In our opinion the judgment of the Circuit Court must be

REVERSED.

55	145
79	843

WIGHTMAN V. SPOFFORD ET AL.

1. **Vendor and Vendee: ASSIGNEE OF CONTRACT: PERSONAL LIABILITY OF.** The assignee of a contract for the sale of real estate, by accepting the assignment, becomes a party to the contract, and personally liable thereon for the purchase money then unpaid.
2. **Conveyance: QUIT CLAIM DEED: EFFECT OF.** The grantor by a quit-claim deed takes the property described therein subject to equities existing in favor of others, and this rule is not changed by the fact that such deed contains the words "bargain and sell."

Appeal from Polk Circuit Court.

FRIDAY, APRIL 22.

Action in chancery to foreclose a title bond. There was a decree granting the relief prayed for by plaintiff; defendants appeal. The facts of the case appear in the opinion.

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Wightman v. Spofford.

Cole & Cole and R. G. Orwig, for appellants.

Clark & Connor, for appellee.

BECK, J.—I. The original petition asks the foreclosure of a title bond executed by plaintiff to defendant S. F. Spofford, and a personal judgment against him for the amount of the purchase money for the land remaining unpaid. The other defendants are shown to be purchasers under Spofford and a mortgagee of such purchasers.

The defendant Spofford, answering, denies generally all the allegations of the petition, and specifically denies the purchase of the land from plaintiff, or that defendant entered into any obligation to pay plaintiff any sum of money for the purchase of the land described in the title bond. The answer is made a cross petition and defendant therein avers that there appears of record a certain title bond executed by one Mary S. Leavitt to Emily Wightman, which defendant alleges was procured by fraud and without consideration. It is also alleged that the instrument falsely recites that a certain title bond for the same land executed by P. M. Casady to William Farrah was assigned by Farrah to Mary S. Leavitt, and by her to Emily Leavitt. It is also shown that a quit claim deed from Emily Wightman for the property, a lot in Des Moines, appears of record, which defendant alleges is fraudulent and void. These instruments are alleged to be a cloud upon the title of the land.

Defendant Robertson answered separately, denying the allegations of the petition, and filed a cross petition alleging that he purchased the land of Spofford, who conveyed it under such purchase by a warranty deed, and afterwards procured Casady to execute to him a quitclaim deed which vested him with the title. He asks that his title may be quieted.

After the evidence had been introduced at the trial, the plaintiff, by leave of the court, filed an amended petition, alleging that, being the owner of the lot, he entered into a con-

Wightman v. Spofford.

tract with one L. T. Townsend to convey it to him, wherein Townsend obligated himself to pay plaintiff the sum of \$100, cash in hand, and \$500 in deferred payments; that thereupon Townsend entered into possession of the land and afterwards sold it to defendant Spofford, and transferred to him the contract executed by plaintiff for the conveyance of the property; that Spofford took possession of the land under this contract and thereby became liable to plaintiff for the purchase money, all of which has become due, and that Robertson purchased the land of Spofford and took possession under such purchase. It is shown that the amended and original petition relate to the same cause of action, and recovery is only sought upon one, according to the evidence and the law applicable to the case.

II. The testimony establishes the following facts:

1. The title of the land was originally in Casady, who contracted to convey it to Farrah.
2. Farrah sold his interest in the property and assigned the contract with Casady to Leavitt, who sold to Emily Wightman and executed a bond for a deed; Emily Wightman sold to plaintiff, and executed a deed for the property.
3. Plaintiff sold the property to Townsend, and the parties entered into a written contract, whereby plaintiff became bound to convey the land upon receipt of the purchase money which Townsend obligated himself to pay.
4. Townsend sold to Spofford and executed to him an assignment of the contract. Spofford took possession of the land under this purchase. The plaintiff claims that at Spofford's request he executed a bond to Spofford to convey the land to him. Spofford denies that the bond was delivered to him or that he authorized its execution. The Circuit Court appears to have found that Spofford did not accept this bond and was not bound by it. We think this conclusion accords with the preponderance of the testimony.
5. Spofford sold and conveyed the lot by a deed of warranty to defendant Robertson, and afterwards procured Cas-

Wightman v. Spofford.

ady to execute a quitclaim deed to Robertson conveying the property.

III. We will proceed to consider the rights and liabilities of the respective parties under the facts we have found as above stated.

1. As to the liability of Spofford. The writing between plaintiff and Townsend bound plaintiff to convey the land and the other party to pay for it. The contract is assignable and was assigned to Spofford by Townsend. It is not denied that Spofford accepted the assignment and claimed an interest under the contract. On the ground of his being the assignee he procured the quitclaim deed from Casady. When Spofford accepted the contract as an assignee, and became clothed with all the rights conferred by it, he assumed all the obligation of his assignor. He could not hold plaintiff to the terms of the contract and stand himself discharged from it. This conclusion is based upon the plainest principles of equity. Familiar principles of the law impose on him, upon accepting the assignment and taking the place of Townsend, the obligation to perform Townsend's covenants, and render him liable for failure to perform them.

The cases cited by counsel for defendants upon this point are not applicable. They hold that the purchaser of the mortgaged property is not personally liable for the debt secured in the absence of an agreement to pay it. See *Hull & Co. v. Alexander et al.*, 26 Iowa, 569; *Johnson v. Monell*, 13 Iowa, 300. In the case before us, the acceptance of an assignment makes Spofford a party to the contract.

IV. 2. As to the right of Robertson. This defendant holds title to the lot under the quitclaim deed executed by Casady. He does not rely upon the deed executed by Spofford, who he concedes did not have the title. As he bases his title upon a quitclaim deed, he cannot be regarded as a purchaser without notice of plaintiff's equities. *Watson v. Phelps et al.*, 40 Iowa, 482; *Springer et al. v. Bartle*, 46 Iowa, 688.

Wightman v. Spofford.

It is urged that the deed executed by Casady, as it contains the words "bargain and sell," is not a mere quit claim. See *Sibley v. Bullis et al.*, 40 Iowa, 429. But we think the use of these words does not authorize the conclusion that the deed in question is not a quitclaim. The deed conveys not the property, but quitclaims the grantor's right, title, interest and estate therein. This makes it a mere quitclaim deed.

V. It is urged in the argument of defendant's counsel that there is no evidence showing the chain of title to the lots. But it was admitted at the trial in the court below, as the record shows, by both parties, that the title was in Casady, and both parties claim under him; it is shown that he contracted to sell the lot to Farrah, and that the parties respectively acquired interest in the property as stated in our conclusions upon the facts. These parties successively held possession under their respective purchases.

VI. It is urged that no tender of a deed is shown. None was necessary. *Montgomery v. Gibbs*, 40 Iowa, 652; *Winton v. Sherman*, 20 Iowa, 295.

But surely the defendants cannot complain that no deed has been tendered; it is clearly shown that Robertson has acquired the title to the property.

VI. The counsel for defendants, after the cause was submitted, filed a reply to plaintiff's argument. Counsel for plaintiff moves to strike this reply from the files. Defendant's counsel insist that the reply was filed pursuant to agreement made in open court. In view of the facts that we affirm the decision of the court below, a ruling upon the motion would be of no importance to plaintiffs. As the case now stands we will make no ruling upon it. We frankly say that we considered the reply, and had we reached the conclusion that it contained arguments or authorities that required an answer from the other side, we would have given plaintiff's counsel an opportunity to reply to it. The decree of the Circuit Court is

AFFIRMED.

 Berryman v. Manker.

BERRYMAN V. MANKER.

1. **Promissory Note: SURETY: DISCHARGE OF.** Where, after a note has been signed by the principal maker and a surety, and delivered to the payee, it is signed by others as sureties, without the knowledge and consent of the one first signing, he is thereby discharged from liability thereon.
2. —: —: —. The fact that the additional sureties signed the note in pursuance of an agreement between the principal and the payee, made at the time the note was delivered, will not prevent the discharge of the first surety.

Appeal from Montgomery Circuit Court.

TUESDAY, JUNE 7.

THE petition states the plaintiff, defendant, and Peterson were sureties for one Irons, on a promissory note. That the plaintiff and Peterson were compelled to and paid a portion of the amount due on said note. This action was brought to recover of defendant his contributive share.

The defendant pleaded the note had been altered after he had signed it, and it had been delivered to the payee, without his knowledge, whereby he was discharged from all liability thereon, and that after the note had been delivered to the payee he, for a valuable consideration, had been released from all liability and that plaintiff had represented to him the agreement for defendant's release had been carried out, and that he was no longer surety on said note; that defendant relied thereon, and afterward Irons became insolvent.

There was a trial by jury, verdict and judgment for defendant, and plaintiff appeals.

Miller & Bartholomew, for appellant.

C. E. Richards, for appellee.

58	150
93	339
56	159
107	401

 Berryman v. Manker.

SEEVERS, J.—I. The evidence tended to show the note was signed by Irons and the defendant, and sometime thereafter by the plaintiff and Peterson. Whether it was signed by the latter parties before its delivery to the payee, was a controverted question.

1. PROMISSORY
note : surety :
discharge of.

The Court instructed the jury as follows:

"7th. If the jury find from the evidence that the note mentioned in plaintiff's petition was executed by Irons as principal and defendant as surety, and was delivered to the payee, Boots, and you further find that after the delivery of said note to said payee the plaintiff and one Peterson signed it as additional sureties without the knowledge and consent of defendant, such signing after the execution and delivery would amount to a material alteration, and you should find for the defendant."

It is insisted by counsel there was no evidence tending to show the note had been delivered to the payee after it had been signed by Irons and defendant and before it was signed by plaintiff and Peterson.

An examination of the abstract satisfies us this is a mistake. The evidence of several witnesses so tended. With the question whether there was a preponderance of the evidence in favor of the defendant, as to the point above stated, we have nothing to do.

The legal thought of the instruction is that where a promissory note is fully executed by the principal and surety, delivered to the payee, and thereafter, without the knowledge of the surety, the name of another person is added thereto as an additional surety, the first surety is discharged; and it has been so held by this court in *Dickerman v. Miner*, 43 Iowa, 508, and *Hamilton v. Hooper et al.*, 46 Id., 515.

It is insisted there was no evidence tending to show the payee knew the signatures were added without the knowledge of the defendant. In this counsel are mistaken; more than one witness, besides the defendant, gave evidence so tending.

 Berryman v. Manker.

II. The tenth instruction given by the court is as follows:

"10th. Or should you find that there was a general understanding that the note should be signed by the principal, Irons, and the three sureties, and that defendant signed it first, and afterwards at any time before delivery the plaintiff and Peterson signed said note as additional sureties, the defendant would be bound thereby, in the absence of any fraud, that is unless he was deceived by such additional sureties and the other parties to the note as to the existence of the note and his outstanding liability thereon."

The first part of the instruction is exceedingly favorable to the plaintiff, and was clearly given in his interest. No just exception can be taken thereto by him.

This cannot be said of the latter part of the instruction. In relation thereto, we desire to say there was evidence tending to show the defendant made efforts to and had some reason to believe he had been released from all liability on the note. The latter part of the instruction is based on this evidence, and we have no doubt the correct rule is stated in the instruction, if there was evidence to justify it. The close point is, whether there was evidence tending to show the defendant was deceived by the "additional sureties." The evidence on this point is somewhat meager, but the defendant testified "the plaintiff gave me to understand that I was off the note. This is not denied by the plaintiff, and there are other slight circumstances so tending, so that with some doubt we think there was evidence upon which the instruction could be properly based. Its sufficiency was for the jury.

As the qualification of the first instruction asked by the defendant was in substance the same as the latter part of the tenth instruction given, it follows from what has been said there was no error in qualifying it as was done.

The second instruction asked was properly refused, because it assumes the payee of the note at the time it was delivered
 2. —, —, could agree with the principal maker, without
 — the knowledge of the defendant, that other par-

 Lanpher v. Dewell.

ties were to sign it, and that the defendant would be bound thereby. The defendant could only be bound by his consent or knowledge that it was to be signed by other parties.

Counsel for the appellant have, to a considerable extent, discussed the sufficiency of the evidence to establish the propositions upon which the verdict must be necessarily based. But as no such error is assigned, we cannot consider the same.

AFFIRMED.

LANPHER V. DEWELL ET AL.

56	153
93	386

1. **Justice of the Peace: JURISDICTION: IMPRISONMENT.** A justice of the peace has no authority to commit a person to prison for nonpayment of a fine for contempt, where the judgment imposing the fine does not provide for imprisonment, and he is liable for damages in an action of tort to a person so illegally committed.

Appeal from Harrison Circuit Court.

TUESDAY, JUNE 7.

ACTION at law upon a bond given by a justice of the peace. There was a verdict and judgment for plaintiff. Defendants appeal. The facts of the case appear in the opinion.

Smith & Clide, for appellants.

W. S. Shoemaker, for appellee.

BECK, J.—I. The petition alleges that defendant Dewell was a justice of the peace, and, with the other defendants herein as his sureties, executed an official bond **THE PEACE: JURISDICTION: IMPRISONMENT.** as required by statute, upon which this action is brought. For a cause of action upon the bond it is averred in the petition that defendant Dewell, under color of his office as justice of the peace, oppressively and

Lanpher v. Dewell.

without authority of law issued a commitment whereon plaintiff was imprisoned in the county jail for two days. Plaintiff asks judgment upon the bond for the damage sustained by him by reason of his unlawful imprisonment upon the commitment issued by defendant.

The defendant Dewell alleges that before him, acting as a justice of the peace, plaintiff was adjudged to be in contempt by reason of his failure to perform a duty imposed upon him as a ministerial officer of defendant's court, and upon such adjudication a commitment was issued whereon plaintiff was detained in the county jail. Other allegations of the pleadings need not be set out. The sureties on the bond failed to answer, and thereupon a default was entered against them. Under a written stipulation of the parties the cause was submitted to the jury for the assessment of damages, "subject to the decision of the court as to whether a recovery can be had at all."

II. It appears from the evidence that defendant Dewell, as a justice of the peace, issued two executions upon judgments rendered by his predecessor in office. Subsequently defendant set aside these judgments on the ground that they were void for the reason that no notice was served or returned, and no judgments in fact were ever rendered by the justice, the entries of what purported to be the judgments having been made by a person other than the justice of the peace. Thereupon he directed plaintiff, who as constable held the executions, to return them. Upon the refusal of plaintiff to obey this order, defendant instituted proceedings against him for contempt. Notice was issued requiring the plaintiff to appear and purge himself of the alleged contempt, and a warrant was also issued for his arrest, upon which he was brought before the defendant. His reason for disobeying the order for the return of the executions being held insufficient the defendant rendered a judgment against him for a fine of \$5. The plaintiff afterwards delivered the executions to the defendant, but failed to pay the fine. Thereupon a commit-

ment was issued ordering defendant's imprisonment until he should be legally discharged, upon which he was confined in the county jail for two days.

III. We will proceed to state certain rules and principles of law applicable to the case before us.

A justice of the peace has cognizance of contempts and may punish a person adjudged guilty thereof by fine not exceeding \$10. Code, sections 3491, 3493.

But a justice cannot, as a punishment for a contempt, commit an offender to prison. Code § 3493. He may in a criminal case commit the defendant until the fine adjudged against him be paid. But to authorize such commitment the judgment must so direct. Code § 4689.

It may be conceded for the purpose of this case that the provision for the commitment of a defendant in a criminal case is applicable to a case of contempt. Unless it is applicable there is no statute conferring authority upon the justice to commit the offender for nonpayment of a fine.

But this provision authorizes the commitment only upon a judgment that the defendant stand committed until the fine be satisfied. Code § 4689. Unless there be such a judgment the defendant cannot be imprisoned.

It cannot be claimed that an execution may be issued by the justice of the peace upon which the property of a citizen may be seized unless there be a judgment authorizing such seizure. It would be no answer to the execution in such a case to urge that the justice has jurisdiction in a proper case to render a judgment upon which the execution could have issued. The ready reply to the objection would be that while he had jurisdiction to render the judgment he did not in fact render it, and the execution is, therefore, void.

In the case before us the defendant rendered no judgment or order requiring the plaintiff to be committed until the fine was paid. The commitment was process without a judgment, and was, therefore, void.

IV. We need not inquire whether the defendant acted as

Lanpher v. Dewell.

a judicial or as a ministerial officer in issuing the process. Surely it cannot be claimed that as a judicial officer he had jurisdiction to issue the commitment when there was no judgment upon which to base it; and it is equally plain that, if he acted ministerially, he had no authority to issue the warrant. We think it cannot be doubted that as the defendant issued the commitment in the absence of a judgment, thus acting without authority or jurisdiction, he is liable to plaintiff in this action. See 2 Hilliard on Torts, p. 185, and authorities there cited.

V. The defendants urge objections to the introduction in evidence of the judgments upon which the executions were issued and to all affidavits upon which defendant set aside and declared void the judgment. It is insisted that the evidence should have been excluded. We find it unnecessary to determine the question thus presented, for the reason that we do not consider this evidence in the view we take of the case. Our conclusions are based upon the absence of an order or judgment committing the plaintiff until the fine should be paid. The entries upon defendant's docket showing his action in the contempt matter were admitted in evidence without objection. If we should conclude that the evidence objected to is incompetent we would be required to hold that its admission did not work prejudice to defendant, and, for this reason, we could not for the error disturb the judgment.

VI. Our conclusions above expressed are not in conflict with *Henke v. McCord*, heretofore decided by this court. See 55 Iowa, 378. In that case we held that a justice of the peace who attempts to enforce an ordinance of a city, which is void for want of authority of the city to enact it, is not liable as a trespasser. The distinctions between that case and this are obvious. In that case the justice of the peace pursued the forms and requirements of what purported to be law; in this case the defendant acted in violation of an express statute. In the first case he determined judicially that the ordinance was valid. But the de-

Foerder v. Wesner.

fendant in this case made no adjudication that the statute authorized him to commit the defendant in the absence of a judgment or order to that effect, an act which we have seen was in excess of his jurisdiction.

The foregoing discussion disposes of all questions in the case. It is our opinion that the judgment of the Circuit Court ought to be

AFFIRMED.

A motion of plaintiff to strike the evidence from the record and to dismiss the appeal need not be considered, in view of the disposition we have made of the case.

FOERDER V. WESNER ET AL.

1. **Mechanic's Lien: WHO IS ENTITLED TO: IMPLIED CONTRACT FOR LABOR.** One who performs labor for a contractor in the erection of a building may establish a lien against the building therefor, though no express contract for payment was made.
2. —: —: **FOREMAN.** The fact that one who performs labor on a building also acts as overseer of other workmen will not defeat his right to a mechanic's lien.

Appeal from Union District Court.

TUESDAY, JUNE 7.

THIS action is brought to recover of the defendant Wesner \$200, for labor performed by plaintiff as a mechanic, and to establish as against the defendant Bell a mechanic's lien upon a building owned by him, upon which the work in question was done.

The defendant Wesner alleges that he and the plaintiff were partners in the erection of the building in question; that the contract price lacked \$600.18, of paying for the building,

Foerder v. Wesner.

which sum defendant has paid, and that there is now due him from plaintiff on this account \$300.09.

The defendant Bell answered admitting his ownership of the building and the real estate upon which it is situated, and that plaintiff filed his claim for a lien and notified him thereof as alleged, and averring that as to the other facts alleged in the petition he has not knowledge nor information sufficient to form a belief. The cause was referred to W. E. Adams, Esq., who reported the facts and his legal conclusions, recommending a judgment against the defendant Wesner for the sum of \$192.50, and that plaintiff's mechanic's lien be established and foreclosed.

The court overruled the motion of the defendants to set aside the report of the referee, and entered judgment in accordance with said report. The defendants appeal.

McDill & Sullivan, for appellants.

Harsh & Higbee, for appellee.

DAY, J.—I. It is clearly established that the plaintiff performed labor upon the building in question. The principal inquiry is whether this labor was performed as a partner or as an employe of the defendant Wesner. We have carefully examined the evidence and the arguments of counsel upon this point. Some portions of the testimony are not fully reconcilable with either view of the question. The defendant Wesner alleges the partnership, and upon him is the burden of establishing it. We are of opinion that there is not a preponderance of evidence in his favor, and that the finding of the referee is correct. The facts that the written contract for the erection of the building was executed in the name of Wesner alone, and that he drew all the money upon the contract, and borrowed in his own name money to carry on the work, are strongly against the existence of a partnership. It must, upon the other hand, be admitted that portions of the testimony tend strongly to establish a partnership,

Foerder v. Wesner.

but not sufficiently, as we think, to create a preponderance in defendant's favor.

II. It is insisted that, if no contract of partnership was made, the contract which the law implies upon the part of Wesner to pay Foerder what his services were reasonably worth will not support and justify the establishment and enforcement of a mechanic's lien. It is said that all such a contract imports is that the labor was done on the building, and this alone is not sufficient; there must also be proof to establish the further fact that the labor was furnished specially, or for the purpose of being used for or about the building. Citing *Cotes & Davies v. Shorey*, 8 Iowa, 416. But where labor is done upon a building it is impossible that it could have been done for the purpose of being used elsewhere, so that proof of the performance of the labor is proof that it was furnished for the purpose of being used for or about the building. The case is a very different one from the furnishing of materials, which, although used in the erection of a building, may not have been sold for that purpose. That a mechanic's lien may be enforced upon an implied contract was held by this court in *Neilson, Benton & O'Donnel v. The Iowa Eastern R. Co.*, 51 Iowa, 184.

III. The plaintiff had charge of the hands employed upon the brick work of the building, and, in addition to the performance of actual labor, he acted as overseer or foreman. It is claimed that for his services as overseer or foreman he is not entitled to a lien, and that, as there is no proof of the value of his services except in gross, he can have no lien for any portion of his services. We need not determine whether a mere overseer would be entitled to a lien. We feel satisfied that the plaintiff should not be denied a lien merely from the fact that, in addition to the performance of labor, he acted as an overseer.

We are of opinion that the judgment of the court is right.

AFFIRMED.

KRUMWEIDE ET AL. V. SCHROEDER ET AL.

1. **Justice of the peace: JURISDICTION: LANDLORD AND TENANT.** A justice of the peace has no jurisdiction to render a judgment of removal against a lessor to put his lessee in possession.

TUESDAY, JUNE 7.

Appeal from Bremer District Court.

ACTION for an injunction to restrain the execution of a warrant of removal from premises alleged by plaintiffs to constitute their homestead. The injunction was granted, and afterwards a motion was made to dissolve the same, which motion was overruled. From the order overruling the motion the defendants appeal.

M. E. Billings & Co. for appellants.

A. F. Brown, for appellee.

ADAMS, CH. J.—The warrant or order of removal was granted by the defendant Stephenson as justice of the peace.

In the action in which the judgment was obtained upon which the order was issued, Schroeder claimed that the plaintiff, Fred Krumweide, leased the premises to him and afterwards refused to give possession, at least so far as the dwelling house on the premises is concerned. Mrs. Krumweide, wife of Fred Krumweide, who is joined as plaintiff herein, was not a party to the lease or to the action in which the judgment of removal was obtained. We do not, however, deem this fact material, for it appears to us that the justice had no jurisdiction to render a judgment of removal even against her husband. It may have been supposed that the action was one for forcible entry or detention of real property, but it was not such action. The statute makes no provision

Wood v. Porter.

whereby a lessee can maintain such action against the lessor. We think that the judgment of removal was void and the execution of the order issued thereon properly restrained.

AFFIRMED.

WOOD V. PORTER.

56	161
90	589

1. **Evidence: TO ESTABLISH FRAUD: DEGREE OF PROOF.** A preponderance of evidence, only, is required in a civil action to establish the making of fraudulent representations. Following *Welch v. Jugenheimer*, p. 11, *ante*.
2. **Practice: INSTRUCTIONS: ASSUMPTION OF FACTS.** It is competent for the court to assume, as a basis for instruction to the jury, the existence of facts which are admitted or established by uncontradicted evidence, and unless the contrary is shown, it will be presumed that facts so assumed are thus established.

Appeal from Appanoose Circuit Court.

WEDNESDAY, JUNE 8.

ACTION AT LAW. The pleadings and facts of the case, so far as they are necessary to be stated for a proper understanding of the points ruled, sufficiently appear in the opinion. There was a trial to a jury and a verdict and judgment for defendant. Plaintiff appeals.

J. C. Coad, for appellant.

Tannehill & Fee, for appellee.

BECK, J.—The petition alleges that plaintiff's wife employed defendant, who is an attorney at law, to prosecute against her husband an action for a divorce and alimony; that in pursuance of his employment defendant did commence such an action and that plaintiff and his wife, soon after the commencement of the suit, settled all differences be-

Wood v. Porter.

tween them and became reconciled to each other and were desirous to have the action for divorce dismissed. Thereupon plaintiff called upon defendant, who had been counsel for both plaintiff and his wife, after the commencement of the divorce suit, for the purpose of having the suit dismissed and paying the costs therein, when defendant informed plaintiff that the court had ordered him to pay into court the sum of \$208.50 as costs and alimony and the cause could not be dismissed until that amount had been paid. It is alleged that these representations were false and made for the purpose of defrauding plaintiff, who, relying thereon, did pay defendant the sum of \$65 in cash and executed to him a promissory note for the further sum of \$93.50, which defendant transferred before maturity to a bank, having no notice of the fraud of defendant in obtaining the paper. The defendant in his answer denies all the allegations of the petition.

II. The court instructed the jury that, to authorize them to find for plaintiff, they must be satisfied beyond a reasonable doubt that the representations alleged were made by defendant; that they were false and that defendant knew them to be false; applying to the case the rule of *Barton v. Thompson*, 46 Iowa, 30. This case we have overruled in *Welch v. Jugenheimer*, p. 11, *ante*, and the rule therein announced is no longer recognized by this court. The instruction, therefore, must be now regarded as erroneous.

III. The court instructed the jury that defendant was not the attorney of plaintiff in the divorce suit, but was the attorney of the plaintiff's wife. This instruction is the ground of an objection urged by plaintiff. While it is not competent for the court to instruct the jury upon the facts of the case, yet if a material fact is admitted or proved without conflict in the evidence, no prejudice can result from the court stating the fact as established, or that it should be regarded as established by the jury. We have not the evidence before us, and therefore cannot ques-

1. EVIDENCE:
to establish
fraud: de-
gree of proof.

2. PRACTICE:
Instructions:
assumption
of facts.

 Petrie v. Boyle.

tion the fact stated in the instruction complained of, but, on the contrary, we must presume that the statement was made upon the admission of the parties or upon uncontradicted evidence. For the error in the first instruction, the judgment of the Circuit Court is

REVERSED.

 PETRIE V. BOYLE ET AL.

56	163
89	263

1. **Practice:** VERDICT: ERROR WITHOUT PREJUDICE. A party is not deprived of his right to a judgment on the verdict of a jury in his favor by the fact that special interrogatories were erroneously submitted to the jury by the court, where the answers to such interrogatories in no manner conflict with the general verdict, and their submission could not have been prejudicial.

Appeal from Clarke Circuit Court.

WEDNESDAY, JUNE 8.

THERE are three counts in the petition. The first seeks to recover under a contract made in 1865, whereby the plaintiff performed labor for the defendant until 1878, for a specified compensation. The second count alleged the plaintiff had worked for the defendants from 1865 to 1878, and that she was entitled to recover what her services were reasonably worth. The third count need not be set out. The answer consisted of a general denial and certain special defenses, which it is unnecessary to state at length.

There was a trial by jury, and certain special interrogatories were submitted to them. The general verdict was in favor of the plaintiff for three hundred dollars. The plaintiff moved for judgment and the defendant for a new trial. The latter was sustained and the plaintiff appeals.

Stuart Bros. and Likes & Cherry, for appellant.

M. L. Temple and *Henry Stivers*, for appellees.

Petrie v. Boyle.

SEEVERS, J.—The special interrogatories were submitted to the jury on motion of the court, at the time the instructions were given, and were as follows:

“1. Did the plaintiff, after she became 18 years of age, request to leave the employ of the defendants and marry a suitable man to whom she was at that time engaged, and who wished to marry her; and if after so expressing herself, did she still remain at the request and solicitation of the defendants and work for them until she finally got married?

Answer—Yes.

“2. How long did plaintiff work for defendants after such request to leave (if she made such request), referred to in prior interrogatory?

“Answer—About three years.

“3. What was plaintiff’s labor reasonably worth during the time she stayed with defendants, referred to in the two prior questions?

“Answer—Three Hundred Dollars.”

A new trial was granted on motion of the defendants, on the sole ground the court had erred in submitting the interrogatories to the jury. The grounds upon which the court proceeded are not stated in the abstract, but we are advised by counsel for the appellees the interrogatories were not submitted to them before the “argument to the jury was commenced,” and therefore the new trial was granted.

The Code provides the jury “may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact, to be stated to them in writing, which questions of fact shall be submitted to the attorneys of the adverse party, before the argument is commenced. Code, § 2808.

It is clear, when interrogatories are propounded at the instance of one party, they must be submitted to the adverse party, before the argument is commenced. But is this so when they are submitted on motion of the court; in such case, can it be said there is an adverse party, or should the statute

be so construed as to permit the court in the furtherance of justice to submit special interrogatories to the jury, without submitting them to either party? It not being necessary to determine this question, we pass it.

The petition claimed to recover a reasonable compensation for labor, done during the period from 1865 to 1878. The special interrogatories are confined to a portion only of that time, and the jury have found in their answers thereto that the plaintiff worked for the defendants for three years, at their request, and that a reasonable compensation therefor was three hundred dollars. As the general verdict was for the same amount, it is evident the general and special verdicts do not conflict, but are strictly in accord with each other, and are, without doubt, based on the same thing.

1. PRACTICE:
verdict: er-
ror without
prejudice.

Conceding the special interrogatories were improperly submitted to the jury, can it be said the defendants were prejudiced? It cannot be presumed the jury were influenced in finding the general verdict, because of the submission of the special interrogatories. The plaintiff was entitled to judgment on the general verdict, and the special verdict does not take away or affect such right, nor in our opinion can it be said the defendants have been in any manner prejudiced. It is said the interrogatories are misleading and do not call for ultimate facts. This may be admitted, but as the plaintiff's right to judgment on the general verdict is in no manner aided, or adversely, affected thereby, it cannot be said they were prejudicial.

We have noticed all that has been said by counsel for the appellee in their argument, but, notwithstanding what is said, believe the case to have been fairly and fully presented to the jury, that they were fully warranted, under the evidence, in finding the general verdict, and that the court erred in setting it aside.

REVERSED.

Hart v. The C., R. I. & P. R. Co.

HART v. THE C., R. I. & P. R. Co.

SAME v. SAME.

1. **Railroads: NEGLIGENCE: SIGNALS AT CROSSINGS.** In actions to recover for injuries received by the plaintiffs, by reason of the frightening of the team they were driving, caused by the sudden opening of the escape valves of an engine attached to one of defendant's trains, standing at a public crossing, it was held that the fact that the defendant did not provide a flagman at the crossing, or give other signals to warn the plaintiffs of the movements of the engine, should be considered in determining the question of the defendant's negligence, such signals being required not alone to prevent collisions, but to enable travelers upon the highway to guard against other accidents as well.
2. —: —: —. The defendant, in the use of its road, was bound to exercise reasonable care and diligence to prevent injury to the persons and property of those lawfully using the highway, and whether it did so or not was a question for the jury, under all the evidence.

Appeal from Polk Circuit Court.

WEDNESDAY, JUNE 8.

THE plaintiff Louisa A. Hart claims of the defendant ten thousand dollars, on account of injuries alleged to have been sustained through the defendant's negligence. The plaintiff John P. Hart claims fifteen thousand dollars, on account of injuries alleged to have been sustained in like manner.

By agreement of counsel, the causes were tried together. The petitions of plaintiffs allege in substance that they sustained the injuries of which they complain whilst attempting to cross the line of the defendant's road on Fifth Street in West Des Moines; that the defendant did not have any flagman or watchman at said crossing, or do any act or take any precaution to warn travelers not to cross, or give them warning of danger; that the defendant's train and engine stood upon its track east of Fifth Street, and within fifteen or twenty feet of the beaten line of Fifth Street, where it crosses the railroad track; that the plaintiffs drove along Fifth Street and

56	166
92	694
56	166
93	687
56	166
118	357
118	359
118	360
56	166
129	253
56	166
131	35

Hart v. The C., R. I. & P. R. Co.

were just crossing the defendant's track within fifteen or twenty feet of the head of the defendant's engine, when the defendant negligently, and without any notice of its intention to do so, caused the drip-cocks and valves on said engine to be opened and the steam and water to escape therefrom with a loud noise, and negligently permitted the bell on said engine to be rung, whereby the horses became frightened and unmanageable and overturned the buggy, throwing the plaintiffs to the ground and severely injuring them. The causes were tried to a jury, and a verdict in each case was returned for the defendant. The plaintiffs appeal. The material facts are stated in the opinion.

Smith & Baylies, for appellants.

Wright, Gatch & Wright, for appellee.

DAY, J.—The evidence tends to establish the following facts: The plaintiffs, John P. Hart and Louisa A., his wife, left their home in Warren county, on the morning of January 29th, 1878, arrived in Des Moines before noon of the same day, and stopped with friends at the north-west corner of Fourth and Elm streets. They were traveling in a two-seated, open buggy, drawn by a pair of gentle horses. The place where they stopped is two blocks south of Vine Street, on which are the principal tracks of the C. R. I. & P. Railroad. Between three and four o'clock in the afternoon of the same day they resumed their journey, to visit relatives some miles north of Des Moines. They drove up Fourth Street, crossed the Valley railroad on Market Street, and when nearing Vine Street found the Fourth Street crossing blocked by a train of cars standing across it. They then turned west through the alley in the middle of the block to Fifth Street, striking Fifth Street about one hundred and forty feet south of Vine Street. When they came upon Fifth Street they saw defendant's engine standing upon one of the five tracks on Vine Street, facing west and with its front about at the sidewalk on the east

Hart v. The C., E. I. & P. R. Co.

side of Fifth Street, where it had been standing for about twenty minutes. Plaintiffs had been informed that the train on the Winterset and Indianola branch of said road was in the habit of lying there for some time preceding its departure, and that when about ready to go out it was backed down east to the depot between Third and Fourth Streets. The engine was apparently attached to a train lying in its rear. There was no flagman at the station, nor were any other means provided to give warning of danger. The plaintiffs looked and listened for a sign or signal of motion or danger, and neither seeing nor hearing any, they proceeded to drive across the street. Just as their team had arrived at the street crossing, and as it was about to step upon the first railroad track on Vine Street, the steam was let off the engine, the bell was rung and the engine began to back. The noise frightened the horses and they immediately backed, cramped, turned and upset the buggy, by which plaintiffs were thrown upon the ground and both seriously injured.

When an engine has been standing for some time, water forms in the cylinder from the condensation of steam, and it is usual, and considered necessary for the safety of the engine, for the engineer to open the cocks under the cylinder and expel the water before starting the engine.

I. The court instructed the jury as follows:

"10. It is alleged in plaintiffs' petition that defendant failed and neglected to provide a flagman at this crossing. There is no statute in this State requiring railroad companies to have flagmen at street crossings, and at common law it is only required that defendant shall have flagmen at crossings very much used, to warn persons about to cross the track of the approach of engines and cars thereto, and to prevent collision, by persons on the highway, with such moving engines and cars, and failure to have a flagman at the crossing is immaterial in this case, and not to be considered by you, unless you believe from the evidence that such engine was approaching, or about to approach, toward said crossing."

"13. If, in the testimony, you find no evidence as to what would be the duty of a flagman, then you cannot presume what such duties would be, and in the absence of testimony as to his duties, the want of a flagman would be taken out of your consideration, and would not be proper for you to take into account in making your conclusion as to defendant's negligence."

1. These instructions are inconsistent, and for that reason erroneous. The tenth instruction directs the jury as a matter of law that the duty of a flagman is to warn persons about to cross the track of the approach of engines, and to prevent collisions by persons in the highway with such moving engines and cars. The thirteenth instruction, in effect directs the jury that the duty of a flagman is a matter of fact to be determined from the testimony, and that in the absence of testimony on the subject they cannot determine what the duty of a flagman is. The conflict between the instructions is apparent.

2. These instructions are not only conflicting, but they are both positively erroneous, to the prejudice of the appellants.

The case of *Norton v. Eastern Railroad Company*, 113 Mass., 366, is directly in point. In that case the plaintiff offered to prove that he was riding in a wagon drawn by a horse on a highway crossed by the defendant's track at grade; that when he had approached within thirty-six feet of the track a train of cars passed over the crossing and frightened the horse, causing him to kick and break the plaintiff's leg; that there was no flagman near the crossing, and no flag was shown, bell rung or whistle sounded to indicate the approach of the train, though there was a flag station there, and a flagman was accustomed to display a flag there to warn travelers of the approach of the train. The court rejected this and other evidence offered by the plaintiff, and ruled that the facts if proved would not support the action. The statute required the ringing of a bell and the sounding of a whistle, but did not require the employment of

1. RAILROADS:
negligence:
signals at
crossings.

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a flagman. The defendants insisted that even if they neglected the statutory signals of ringing the bell and sounding the whistle they would not be liable, because such signals are intended to protect travelers at highway crossings from actual collision only, or at most from taking a position involving imminent danger of collision.

The court, after holding that the signals provided by statute cannot be limited as claimed, proceeded to consider the evidence offered of the absence of a flagman as follows: "Evidence was offered by the plaintiff tending to show that the defendants had failed to take precautions, other than those expressly required by statute, in announcing their approach to the crossing (such as were proper and such as they had accustomed travelers on its highway to expect), which was excluded by the court, the plaintiff not having been exposed by neglect of them to collision or any danger thereof. That mere compliance with statutory requirements will not absolve the railroad corporations from any duties they were under before, or excuse them from taking other reasonable precautionary measures when their trains are crossing or about to cross a highway, is well settled. In case of collision, it is for the jury to say whether such measures have been adopted, and whether under the circumstances of the case the railroad corporation has used reasonable care to prevent it. *Bradley v. Boston & Maine Railroad*, 2 Cush., 539; *Linfeld v. Old Colony Railroad Company*, 10 Cush., 562. The reasons upon which we have held that the statutory requirements are not intended for the purpose of guarding against collision only, at crossings of the highway made at grade, compel us also to hold that the obligation to take such other reasonable precautions, at such points, as are required for the safety of the traveler upon the highway, is one which is due to him, not only for this purpose, but also for that of protecting him, or of enabling him in the exercise of reasonable care to protect himself, in approaching the crossing, from the danger of alarm to the animals he is driving. The evidence upon this sub-

ject, which was excluded by the learned judge who presided, should therefore have been admitted."

The evidence here referred to, and which was rejected, was evidence that there was no flagman at the crossing to give warning of an approaching train. No proof was offered of the duties of a flagman. The court held, as a matter of law, that it is the duty of a flagman, not only to warn against collisions, but also to give such warning as will enable a traveler approaching a crossing, in the exercise of reasonable care, to protect himself from the danger of alarm to the animals he is driving. This case, we think, announces the correct rule. It follows that both of the instructions we are considering are erroneous.

II. The court further instructed the jury as follows:

"If you believe from the evidence that the noises made upon defendant's engine, of which the plaintiffs complain, were 2. —: —: such as are usually made in putting in motion an engine, and that they were necessary to the prudent movement thereof, both with respect to persons who might be in the way of such moving train and to the safety of the engine and its parts, then defendant was under no obligation to notify plaintiffs of such intended movement or noise, either by flagmen or otherwise, and failure to do so would not render defendant liable in this action." The giving of this instruction is assigned as error. The defendant had a right to move its trains upon its track. The plaintiff had an equal right to cross the defendant's track at the street crossing. Both of these rights cannot be exercised in an absolute and unrestricted manner. The right of each party is qualified and abridged to some extent by the right of the other. The right of each party must be exercised with a view to the right of the other, and in such manner as not unreasonably to interfere with it. Now to say as matter of law that the defendant was under no obligation, by flagmen or otherwise, to notify the plaintiff of an intended movement and noise in the exercise of its right, amounts to no less than saying as

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matter of law that the rights of defendant are paramount, and may be exercised without regard to the rights of the plaintiffs. Whether the defendants were under obligations to notify the plaintiffs of an intended noise and movement cannot be determined as a matter of law, but is a question of fact, to be determined from all the surrounding circumstances. If the noise and movement were likely to be attended with danger to the plaintiffs, then it was the duty of the defendant to exercise reasonable and ordinary care to prevent injury. And, if the exercise of such reasonable and ordinary care under the circumstances would require notice in some manner to the plaintiffs, then it was the duty of the defendant, as a matter of law, to give such notice. The true doctrine upon this subject is stated in *Pennsylvania Railroad Company v. Barnett*, 59 Penn. St., 259. In that case the plaintiff was driving over a bridge which crossed the defendant's railroad nineteen feet above the track. Whilst the plaintiff was upon the bridge, the defendant's express passenger train from Philadelphia going west passed under it, whistling as it passed, at which plaintiff's horses took fright and ran away, overturning the carriage, throwing him out, injuring him seriously and permanently. In affirming the judgment for the plaintiff, the court say: "It is as clearly the duty of a railroad company, as it is of a natural person, to exercise its rights with a considerate and prudent regard for the rights and safety of others, and for injuries occasioned by negligence both are equally responsible. Nor is it any excuse or justification that the act occasioning the injury was in itself lawful, or that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which it was done. If there was no danger to the persons and property of those who might be traveling along the public road in running its trains without giving any notice of their approach to the bridge, then the company is not chargeable with negligence in not giving it. But if danger might be reasonably apprehended, it was the duty of the company to give some notice or warning, in order that it might

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be avoided. "If it would have been negligence in the plaintiff to drive upon the bridge just as the train was about to pass under it, had he been aware of its approach, then he was entitled to notice, and it was the duty of the company to give it. Whether, therefore, the company exercised proper care and diligence in running the train in order to prevent injury to the persons and property of those who were lawfully on the public road, and in the vicinity of the crossing, was a question for the jury." See also *Hill v. Portland & Rochester R. R. Co.*, 55 Me., 438; *Norton v. Eastern Railroad*, 113 Mass., 366; *Toledo, Wabash & Western Railway Co. v. Harman*, 47 Illinois, 298; *The Manchester Railway Co. v. Fullarton*, 14 C. B., N. S., 53.

The appellee cites and relies upon *Farn v. Boston & Lowell Railway Co.*, 114 Mass., 350. In that case the plaintiff was passing along a highway under a railroad bridge. The decision was based expressly upon the ground that, as the railroad crossed the highway by a bridge, it had no rights in the highway, and consequently the same duties are not imposed upon it that are imposed when it passes over the highway itself in common with the traveler. That a different conclusion would have been reached if the railroad had crossed the highway at grade, as in this case, is evident from *Norton v. Eastern Railroad Co.*, *supra*. The court erred in giving this instruction. The foregoing discussion sufficiently indicates our view of the rights of the parties, without a further consideration of the errors assigned.

REVERSED.

ON REHEARING.

DAY, J.—A petition for a rehearing was filed in the foregoing case, in which the opinion is assailed with much earnestness and vigor. Some of the positions taken in the petition for a rehearing seem to merit and require notice in a supplemental opinion.

I. It is said that the doctrine of the 10th instruction con-

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sidered in the foregoing opinion is "this and no more: that it was not our duty to have a flagman to give warning of other than trains approaching or about to approach a crossing; and that the duty to have one then, even, resulted from the common law, and not from any statutory obligation." It is claimed that this is the law, and that no one does, or can, deny it. It is very evident, however, from the branch of the opinion devoted to this instruction, that this is not the question with which it deals. The instruction goes further than as set out above, and directs that at common law it is "only required that defendant shall have flagmen at crossings * * * * to warn persons about to cross the track of the approach of engines and cars thereto, *and to prevent collision by persons on the highway with such moving engines and cars.*" It is the portion of this instruction which limits the duties of flagmen to the preventing of collisions by persons on the highway with moving engines and cars that we considered and condemned in the foregoing opinion. Hence we cited a case in which the injured person approached no nearer than thirty-six feet to the defendant's track, when he was injured, not by collision, but by the kick of his horse, frightened by a moving train, and in which it was held that the duty of a flagman extends to the giving of warning which would have enabled him to protect himself from such injury.

II. It is claimed that in none of the cases cited in the opinion were the engines and trains receding from the crossing, and that they are, therefore, all inapplicable. It is further claimed that no case can be found where a recovery has been had for any injury sustained whilst the engine and train were receding. The point determined in the cases cited, and in the foregoing opinion, is that it may be negligence for the company to make noises, calculated to frighten the animals of travelers, without giving any warning or notice thereof, and that for any injury resulting the company may be held liable, even when no actual collision occurs.

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It is held that it must be submitted to the jury to determine, as a question of fact, whether, under the circumstances, the making of certain noises, without notice or warning, constitutes negligence. The particular act complained of in this case was the opening of the drip cocks and valves on the engine, and allowing the steam and water to escape with a loud noise. Now if this act may constitute negligence in a train approaching a crossing, there is no principle of law upon which it can be held that it may not constitute negligence in a train receding from the crossing, or standing still. Of course, as a matter of fact, the company may be liable for the making of noises under some circumstances, and not liable for the making of them under other circumstances. But, as matter of law, liability for noises made without notice cannot be limited to cases in which the trains are approaching a crossing. We have examined the entire petition for rehearing with much care, and we see no reason for receding from any of the views expressed in the foregoing opinion. The petition for rehearing is

OVERRULED.

ABBOTT V. CREAL ET AL.

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101 660

1. **Contract: VALIDITY OF: MENTAL UNSOUNDNESS OF PARTY.** Persons of unsound mind will be bound by their executed contracts where such contracts are fair and reasonable and were entered into by the other parties without knowledge of the mental unsoundness, in the ordinary course of business, and where the parties cannot be placed in *statu quo*.

Appeal from Page Circuit Court.

WEDNESDAY, APRIL 8.

THIS is an action for the foreclosure of a mortgage. The cause was referred to J. M. Bartholomew, Esq., who reported the facts as follows:

1. That on the 14th day of November, 1877, the defend-

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ants, Cyrus Creal and John S. Saulsbury, executed and delivered to plaintiff their promissory note as alleged in the petition. And that there is due thereon the sum of \$3,167.80, less \$35.00, admitted in reply.

2. That to secure said note mortgages were given as set forth in the petition.

3. That at the time of the execution of all of the mortgages the defendant, Amanda Creal, had not sufficient mental capacity to contract.

4. That the property described in the mortgage as the north half of block seven, in Ribble's addition to Clarinda, was at the time of the execution of the mortgages thereon used and occupied by the defendants, Cyrus and Amanda Creal, as their homestead, they being husband and wife, and that said property was in fact their home and only home.

5. That at the time of the execution of said mortgages the plaintiff had no actual knowledge of the mental incapacity of the defendant Amanda Creal; that plaintiff parted with his money in good faith, relying upon this security.

6. That the defendants, Cyrus Creal and John S. Saulsbury, are without any property except what is covered by these mortgages, and that the parties cannot be placed in *statu quo*.

As conclusions of law the referee found that the plaintiff is entitled to judgment for the sum \$3,129.15, and to a foreclosure of his mortgage as to all the mortgaged property. The defendants' motion to set aside the report of the referee was overruled, and judgment and decree were entered as recommended. The defendants, Amanda and Cyrus Creal, appeal.

Clark & Parslow and Hepburn & Thummel, for appellants.

N. B. Moore and S. O. McPherrin, for appellee.

DAY, J. I.—It is conceded that Amanda Creal was not of sufficient mental capacity to contract, at the time the mortgage in question was executed. It is claimed by the

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appellants that the fifth finding of the referee is not supported by the evidence, and that Abbott had knowledge, sufficient at least to put him upon his guard, as to the mental incapacity of Amanda Creal, before the mortgage in question was accepted. We have examined the evidence upon this branch of the case carefully, and we unite in the conclusion that it does not support appellant's position. Besides, there is no statement in the abstract that it contains all of the evidence, or all of the evidence applicable to this branch of the case. In the state of the record we cannot disturb any of the referee's finding of facts.

II. It is claimed that, under the findings of facts by the referee, the mortgage is void as to the homestead. It has been settled as the law of this State that persons of unsound mind will be held liable as to executed contracts where the transaction is in the ordinary course of business, is fair and reasonable, and the mental condition was not known to the other party, and the parties cannot be put in *statu quo*. *Behrens v. McKenzie*, 23 Iowa, 333; *Ashcraft v. DeArmond*, 44 Id., 229. It is claimed, however, that under section 1990 of the Code a conveyance or encumbrance of the homestead is of no validity unless the husband and wife concur in and sign the same joint instrument, and that, as Amanda Creal was mentally unsound, she could not concur in the mortgage, and hence no encumbrance of the property was effected. This reasoning would invalidate all contracts of persons of unsound mind, for it is essential to the validity of a contract that there should be a concurrence of the minds of the contracting parties. The very point in controversy was determined adversely to the position of appellant in *Ashcraft v. De Armond*, *supra*, for a portion of the land involved in that case, and to which the deed of conveyance was upheld, was the homestead of the party whose mental unsoundness was alleged, and, for the purposes of the decision, conceded. Following that case, the decree in this must be

AFFIRMED.

HALLAM V. THE INDIANOLA HOTEL CO. ET AL.

1. **Corporation : DIRECTOR: WHEN ALSO A CREDITOR.** A director of a corporation may become its creditor, and take and enforce a mortgage on its property, but he is not thereby divested of his responsibility as a director, nor the duties which as such he owes to the corporation, and he is bound to act in the utmost good faith throughout the transaction.
2. —: —: —. Facts considered upon which it was held that a sale of property of a corporation, under a mortgage held by one of its directors, should be set aside.

Appeal from Warren District Court.

WEDNESDAY, JUNE 8.

THE defendant E. W. Perry and the defendant J. E. Lucas each obtained a decree of foreclosure of a real estate mortgage against the defendant, the Indianola Hotel Co., a corporation duly incorporated under the laws of Iowa. An execution sale was made thereon, and the property was purchased by Perry for the amount of both decrees and interest and costs, and the property is now held by him for himself and Lucas. The plaintiff Hallam is a stockholder in the hotel company and he brings this action to set aside the sale, and the decrees, and the mortgages upon which the decrees were rendered. The alleged ground of the action is that the mortgages were invalid, and that the decrees were obtained by fraud, and that the purchase by Perry at the foreclosure sale should be set aside because Perry is one of the directors of the company. The court dismissed the plaintiff's petition and he appeals

Cole & Cole and H. McNeil, for appellant.

Todhunter & Hartman, for the company.

Henderson & Berry, for Perry.

SeEVERS & Sampson, for Lucas.

ADAMS, CH. J.—One of the mortgages is exceedingly informal, and neither appears to have been executed by the authority of the board of directors of the defendant company. If, therefore, the foreclosure of the mortgages had been resisted by the company it seems doubtful to us whether the decrees thereon could properly have been obtained. But having been obtained they constitute an adjudication, and are binding upon the company unless they were obtained by fraud. It appears to us also that if the company is bound by them all the stockholders are bound by them, including the plaintiff. His interest in the litigation was represented by the company, and he was not only not a necessary party, but not a proper party.

Coming to the question as to whether there was any fraud practiced in obtaining the decrees, we have to say that we think that there was not. The amount for which the decrees were rendered was due from the company, and had become payable. The complaint seems to be that these creditors combined with the officers of the company and were allowed to take decrees of foreclosure, whereas they should have granted an extension, or the company should have borrowed money and paid them off. The objection is not to the mode of foreclosure, so far as obtaining the decrees is concerned, but to the fact of foreclosure. But it is not for us to say that the creditors should have granted an extension, or that the company should have borrowed money and paid them and thereby prevented a foreclosure. If we should conclude that the affairs of the company were very unwisely managed, and that the foreclosures might have been prevented, such conclusion would fall short of justifying us in holding that the decrees were obtained by fraud.

Nor do we think that the fact that Perry was a director of the company necessarily precluded him from making a valid purchase at the foreclosure sale. His right to become a creditor of the company by loaning it money cannot be questioned for a moment. It

1. CORPORATION: director: when also a creditor.

Hallam v. The Indianola Hotel Co.

was equally his right to take security and enforce it, and it seems to follow that he should be allowed for his just protection to bid at an execution sale of the property upon which he was secured. That a director of a corporation may bid at an execution sale made to pay a debt due the director from the corporation was expressly held in *Twin Lick Oil Company v. Morbury*, 91 U. S., 587.

While this is so it is not to be denied that a fiduciary relation exists, and a director cannot wholly divest himself of his responsibility to the company even in the very matter in which he has become an adversary. In *Twin Lick Oil Co. v. Morbury*, above cited, the court said "that a director of a joint stock corporation sustains one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, are viewed with jealousy by the courts and may be set aside on slight grounds, and is a doctrine founded on the soundest morality, and has received the clearest recognition in this court and in others." Citing *Koehler v. Black River Falls Iron Co.*, 2 Black, 715; *Drury v. Cross*, 7 Wall., 299; *Luxemburg R. R. Co. v. Moguay*, 25 Beav., 586; *The Cumberland Co. v. Sherman*, 30 Barb., 553. While, therefore, it was held that the creditor director was at liberty to bid at the execution sale, yet it was said that the liberty should be exercised subject to the rules which belong to his peculiar position. Under the doctrine enunciated we are called upon to look into the acts of Perry with far greater scrutiny than we should be if he sustained no relation to the company other than that of creditor, and would be justified, we think, in setting aside the sale upon much slighter ground.

The defendant company was incorporated for the purpose of building a hotel. The indebtedness in question was incurred as a part of its cost. But it was a comparatively small part, amounting at the time of sale to but little more than \$4,000, and in that sum was included considerable accrued interest. The cost of the hotel ap-

pears to have been about \$19,000. By the execution sale in question the whole property has been exhausted to pay the comparatively small balance of cost of construction. The enterprise has certainly come to a very remarkable result.

Again, the evidence shows that the hotel was at the time of the execution sale rented at \$900 a year. It also shows, we think, that it was worth not less than \$10,000. That it was allowed to be sold upon execution and was not redeemed, nor the right of redemption sold, but a sheriff's deed allowed to issue, while not sufficient to establish fraud, is sufficient to excite suspicion and give some support to the claim strenuously insisted upon by the plaintiff, and of which we think there was some slight evidence at least, that there was a concert of action between Perry and the other officers of the company looking to the attainment of the result which has been reached. Now Perry was charged with the duty, as much as any other director was, of making a reasonable effort to prevent this result. It follows that, our minds being affected with suspicion that such effort was not made, we cannot say that the sale to Perry ought to be allowed to stand. We think that the sale should be set aside and the case remanded; that an account should be taken of the rents and profits received by Perry and Lucas, if any; that the judgment in their favor should be reduced by whatever amounts they are properly chargeable with, less proper expenditures, and an execution issue for the balance and the property be resold.

REVERSED. !

56	182
128	617
56	182
132	667
56	182
1134	606

WARREN V. TAYLOR ET AL.

1. **Will: CONVEYANCE BY TESTATOR AFTER DEVISE: EFFECT OF.** Where a testator undertakes to dispose of both personal and real estate, and he subsequently conveys the real estate, it will not, in general, work a revocation of the will as to the personal property of which he died seized.

Appeal from Davis Circuit Court.

THURSDAY, JUNE 9.

THIS is an action in equity, the object of which is to require the defendants to pay to the plaintiff a legacy of \$500, with interest, which it is alleged is due to the plaintiff from the defendants under the provisions of the last will and testament of John Taylor, deceased. There was a decree in accord with the prayer of the petition. Defendants appeal.

M. H. Jones & Son and Trimble, Carruthers & Trimble,
for appellants.

Payne & Eichelberger, for appellee.

ROTHROCK, J. I.—In the year 1852 John Taylor, who was then a resident of Lee county in this State, made his last will and testament, which was as follows:

“*First.* I give and bequeath unto my wife, Elizabeth Taylor, all my lands and town lots situated in said county (Lee) and State, with all the privileges and appurtenances thereon or in any wise appertaining, and also give and bequeath unto my said wife all my personal property, of every description and kind whatsoever. To have, to hold and to use the said property, both real and personal, during her life time, and at her decease said real property, and so much of my personal property as remains, I give and bequeath unto my daughter Frances Patterson, and to my son John H. Taylor, share and share alike, by their paying to my grand-daughter, Maria

Warren v. Taylor.

Taylor, five hundred dollars when she arrives at the age of eighteen years, and to my grandson, Lewis Taylor, the sum of five hundred dollars when he arrives at the age of twenty-one years, and also to my grand-daughter, Sylvia Payne, the sum of five hundred dollars when she arrives at the age of eighteen years, and if either the said Lewis Taylor or the said Maria Taylor die before arriving at full age, then the surviving one is to receive the share of both, and in case my grand-daughter Sylvia Payne dies before arriving at full age, her share is to descend to her next oldest brother or sister, if she should have any, and if she should die having no brother or sister to heir her said share, then and in that case I will and bequeath said share to my daughter, Frances Patterson, and to my son John H. Taylor, share and share alike."

Plaintiff is the grand-daughter, Sylvia Payne, mentioned in the will, she having since married Clark B. Warren. She was born in 1851, and is now past eighteen years of age. At the time of making the will said John Taylor was the owner of certain lands and town lots in Lee county, which he afterwards sold for \$8,550, in cash. At the time of the sale he had about \$700 in value of personal property, moneys and credits. After the said sale Taylor removed to Davis county, and there invested a part of his money in land and town lots. The balance he received from the sale of his real estate in Lee county was loaned out, and his property was in this situation at the time of his death, which occurred in the month of August, 1868. At his death his widow succeeded to the possession of all his estate, consisting of real estate and personal property, the latter being mostly in notes and demands against third persons.

Elizabeth Taylor died intestate in December, 1878, leaving personal property to the amount of \$9,000 or thereabouts. This property was that left by her husband and the accumulations thereof after his death. Actions were commenced against the said Frances Patterson and John H. Taylor, the residuary devisees under the will, by Maria Taylor, one of the

 Warren v. Taylor.

legatees. In this action Elizabeth Payne, a daughter of the testator, was made a party defendant, and it was claimed by the plaintiff in the action and by said Elizabeth Payne that they were entitled to share in the property of the testator as heirs. The said John H. Taylor and Frances Patterson in their answers in that action claimed that whatever right the plaintiff therein had was under the said will. The action and claim of Elizabeth Payne upon the cross petition were compromised by the parties without a trial. The plaintiff herein was not a party to that action, and as we understand the record John H. Taylor and Frances Patterson claim all of the estate, to the exclusion of the plaintiff and all other persons.

It is contended by the defendants that the sale of the land and town lots in Lee county by the testator worked a revocation of the will.

It is true that the defendants, after the sale of the real estate, could not take it under the will. But the legacy of the plaintiff did not depend upon the defendants taking the real estate as devisees. The will by its terms provided that the widow should have a life estate in the real and personal property, and that the defendants should take the whole of the estate by their paying the specific legacies to the plaintiff and the others named. The defendants claim, however, that although the personal estate at the death of the widow was of the value of about \$9,000, they held the same as heirs and not as residuary legatees. This position seems to us to be unsound. Although the will by the act of the testator ceased to be operative, or rather never became operative, as to the real estate in Lee county, this did not work a revocation as to his personal estate. Where a testator undertakes to dispose of both personal and real estate and he subsequently conveys the real estate it will not, in general, work a revocation of his will as to the personal property of which he dies seized. The conveyance of a part of the estate devised works a revocation *pro tanto* only. 1 Redfield on Wills (fourth ed.) page 339; *Zimmerman v.*

1. WILL: conveyance of real estate devised: effect of.

Coffman v. Ford.

Zimmerman, 23 Pa. St., 375. It will be observed that the will does not limit the disposition of the personal estate to that which was owned by the testator at the date of the will. It clearly contemplates a disposition of all the personal property of the estate at the death of the widow, from whatever source obtained. Now when the defendants assert their right to this property it must be as residuary legatees after the payment of the specific legacies to the plaintiff and others named in the will.

We think the Circuit Court correctly held that the defendants took the estate charged with the payment of the legacy to the plaintiff.

II. This disposition of the case renders it unnecessary to dispose of the motion filed by the appellee.

AFFIRMED.

COFFMAN V. FORD.

1. **Practice: PLEADING: GARNISHMENT.** Where a single pleading was filed controverting the answers of two garnishees, and on motion one of the garnishees was dismissed therefrom as improperly joined therein with his co-garnishee, it was held that the plaintiff was entitled to file a further pleading taking issue upon the answer of such garnishee.

Appeal from Harrison Circuit Court.

THURSDAY, JUNE 9.

ON the second day of January, 1880, the plaintiff commenced an action against Jacob Minton, and attached A. W. Ford and George L. Bacon as garnishees. At the March term, 1880, the garnishees failed to appear, and the cause was continued to the October term. On the 26th day of October the cause came on for hearing, and judgment was rendered against Minton for \$393.43. The garnishees came into court

Coffman v. Ford.

on the 26th day of October, and each answered orally, denying any indebtedness to the defendant Minton, and denying that he had any property in his hands belonging to Minton. The plaintiff thereupon asked and obtained permission to file a pleading on the 29th day of October, taking issue upon the answers of the garnishees. On the 29th day of October the plaintiff filed a reply taking issue in the same paper upon the answers of both Ford and Bacon, and asking judgment against them for the amount of the judgment against Minton. On the 30th day of October A. W. Ford filed a motion that he be dismissed as a party defendant from the pleadings of plaintiff controverting the answer of his co-garnishee, defendant George S. Bacon, upon the ground that the defendant Ford was improperly joined as a party with the defendant George S. Bacon. On the 4th day of November the court sustained the motion, and the plaintiff excepted. The plaintiff immediately filed an amended and substituted pleading controverting the answer of garnishee A. W. Ford, entitling the case John Coffman, plaintiff, against A. W. Ford as garnishee, in case of *Coffman v. Minton*. Thereupon the garnishee Ford filed a motion to strike this pleading from the files, as follows:

"1. The said pleading is improperly on file in this case against George S. Bacon, as the said defendant Ford has been dismissed.

"2. The pleading controverting the answer of A. W. Ford was not filed within the time allowed by the court to plaintiff, to take issue with answer of said garnishee."

The court sustained this motion. The plaintiff appeals.

L. R. Bolter, for the appellant.

W. S. Shoemaker, for the appellee.

DAY, J. Without inquiry as to the correctness of the ruling sustaining the first motion, we are of opinion that

Coffman v. Ford.

the court erred in sustaining the motion to strike from the files the substituted pleading. It is urged that this pleading was filed in the case of *Coffman v. Bacon*, from which Ford had already been dismissed. This is but a technical and narrow view of the question. The main action was *Coffman v. Minton*, and the substituted pleading by its caption shows clearly that that is the case in which it was filed. The pleading was filed in the only manner that it could be done under section 2992 of the Code. The first motion of the defendant Ford was not that he be dismissed as a garnishee, but simply that he be dismissed as a party from the pleading of plaintiff controverting the answer of Bacon. The effect of sustaining the motion was simply to leave the answer of Ford without any pleading controverting it. The plaintiff took issue upon the answer of Ford, within the time allowed by order of the court, but took issue in a manner which the court held to be improper. In fixing the time within which the plaintiff should take issue upon the answer of the garnishees the court did not require the plaintiff at his peril to file a pleading unassailable by demurrer or motion. The plaintiff, upon the sustaining of the first motion, had a right to amend. He availed himself of this right at once, and, in striking his amended pleading from the files the court erred.

REVERSED.

Meeker & Co. v. Ashley.

MEEKER & Co. v. ASHLEY ET AL.

THE SAME v. ANDERSON.

THE SAME v. THE SAME.

1. **Taxation: IN AID OF RAILROADS: CONDITIONS OF TAX.** Where, prior to an election to vote upon the question of aiding in the construction of a certain railroad by a township tax, a paper was circulated among the electors, signed by the president of the railway company and having the corporate seal attached, providing that in case a tax was voted it should be collectible only at specified times and on certain conditions, which paper was issued by and with the consent of a majority of the directors of the company, it was held that the company was bound by its provisions.
2. —: —: —. Where a tax is voted payable only on condition that the road is constructed and ironed to a certain point, such condition is not fulfilled by the construction of a part of the line and the purchase of the remaining portion.

Appeal from Jasper Circuit Court.

THURSDAY, JUNE 9.

ACTIONS of *mandamus* to enforce the collection of certain taxes voted by the electors of Palo Alto and Fairview townships, Jasper county, in aid of the construction of the Iowa, Minnesota and North Pacific Railway. The first action is against the trustees of Palo Alto township, to compel them to certify the tax had been earned. The second is against the county treasurer to compel him to collect the tax of the same township, and the third is against the same officer to compel him to collect the tax voted in Fairview township.

There was a trial to the court and judgment was rendered for the defendants, and the plaintiffs appeal.

Cook & Dodge and Ryan Brothers, for appellants

H. S. Winslow, for appellees.

SEEVERS, J.—I. *As to the taxes voted in Palo Alto township.* The articles of incorporation of the railway company declare the object of the corporation to be, “to acquire, construct, maintain and operate a railroad, commencing at a point hereafter to be determined upon in the southern or southeastern portion of the State of Iowa, and running thence through the counties of Jasper, Story, and Hamilton, via Nevada and Webster city, in a northwesterly direction to the northern boundary line of the State of Iowa.”

The tax was voted on the 20th day of April, 1872, and the notice for the election submitted to the electors “the question of aiding, by a tax of five per cent upon the assessed value of the taxable property of the said township, in the construction of the Iowa, Minnesota & North Pacific Railway, the same being a line of railway projected to and from some point in the southeastern part of Iowa through the counties of Jasper, Story, and Hamilton, by way of Newton, Nevada, and Webster City to the northern boundary of the State of Iowa.”

On the day of the election and before there was “circulated among the voters and was believed by many of the voters and influenced them in the course they took, inducing them to vote for the tax,” a paper signed by the president of the company, with the corporate seal attached, in which among others was the following provision: “First. Said tax shall be payable in three instalments, as follows, viz.: two-fifths of the amount on the first day of January, 1873, or when the road is ironed from the Des Moines Valley Railroad to Newton and the cars running thereon; two-fifths of the amount on the first day of October, 1873, and the balance on the first day of March, 1874.” The fact that an election was about to be held for the purpose of voting taxes to aid in the construction of said railroad was recited in said paper, and therein the said company did “agree with the said trustees for the use and the benefit of tax payers of said township that said tax shall be voted on-

1. TAXATION:
in aid of rail-
roads: condi-
tions of tax.

the basis of the following agreement." Immediately following was the provision above quoted and set out. Below the signature of the president of the company, but attached to and forming a part of said paper, was the following: "The citizens will observe by the first section of the law passed by the legislature February 16, 1872, that all contracts and conditions made by the railway company with the people must be strictly complied with." Following this is the first section of the act approved February 16, 1872, printed in full. Laws of Fourteenth General Assembly, page 2.

The paper aforesaid "was issued by and with the consent of a majority of the Board of Directors" of said company, "and was circulated and used by some of the directors * * * to induce the citizens to vote the subsidy asked for, and with some it had that effect, but there is nothing in the records of the directors' meeting showing express authorization of such action. It was, however, believed the same was valid and binding on the company by both its officers and the voters, and both parties relied upon it.

We think it clearly appears from what has been stated the electors had the right to believe the company would complete and iron the road, in aid of the construction of which the tax was about to be voted, from the Des Moines Valley Railroad to Newton. The only fair construction to be given to the paper signed by the president of the company is that the tax was voted on condition the road then being constructed was ironed as aforesaid and the cars run thereon. There were voters who so believed, and accordingly voted for the tax. This being so the company should not now be permitted to say there was no valid agreement to this effect. But we think the agreement is valid and binding on the company on the ground, in the absence of any showing to the contrary, that the president must be presumed to have had authority to make it, when done "with the consent of a majority of the directors." The fact that such consent has not been entered of record is immaterial. The articles of incor-

poration do not require that everything done by the directors in order to be binding on the company shall be entered of record. In fact there is no provision on the subject. The next question is whether such condition has been complied with.

What was at one time known as the Des Moines Valley Railroad passes through the town of Monroe, in said Jasper
2 —: —: county, from which point the road in ques-
—: —: tion has been constructed, northerly, in the di-
rection of Newton. At the time the tax was voted a
railroad had been constructed by the Chicago, Newton &
South Western Company from Newton "in a southerly
direction to some coal banks in the direction of Mon-
roe." The length of this road is about three and one-
half miles, and the distance from Monroe to Newton is be-
lieved to be about seventeen miles. The Iowa, Minnesota
and North Pacific Railway Company purchased the above
mentioned road three and one-half miles in length, connected
the road constructed by it therewith, and thus it is claimed
the road has been ironed and cars run thereon from the Des
Moines Valley Railroad to Newton.

Under the statute taxes cannot be voted to purchase a constructed railroad. *Lamb v. Anderson*, 54 Iowa, 190. The contention in the cited case was in relation to enforcing the collection of taxes voted in aid of this same railroad, and the point determined was that the collection of such taxes could not be enforced because of the purchase instead of construction of the three and one-half miles of railroad aforesaid. We do not think there is any distinction between the two cases, but there is the additional consideration in this case that the tax was voted on the condition the road then being constructed should be ironed and cars run thereon. This condition cannot be regarded as complied with by the purchase of a constructed road.

II. *As to the Fairview township taxes.* Previous to the election the railroad company made a contract with the

Davies v. The St. L., K. C. & N. R. Co.

trustees of said township whereby the company agreed "that any and all taxes so voted in said township may remain unpaid until the road bed of said railway is graded, tied and ironed from the town of Newton to the town of Monroe."

The validity of this agreement is not denied, but it is insisted, as we understand, the company thereunder was only bound to construct its road in that township, and might well purchase a constructed road no part of which was in said township. What has been heretofore said applies with full force to the taxes of this township. The contract applies, we think, to the whole road between Monroe and Newton. The road then being constructed was to be ironed. This has not been done, and therefore the collection of the tax cannot be enforced. In all the cases the judgments are

AFFIRMED.

DAVIES ET AL. V. THE ST. L., K. C. & N. R. CO. ET AL.

1. **Railroads: CONTRACT FOR RIGHT OF WAY: FORECLOSURE.** *Varner v. The St. L. & C. R. R. Co. et al.*, 55 Iowa, 677, holding that a contract for right of way may be foreclosed, and a judgment for damages for the failure of the railroad company to comply with the same may be rendered and established as a lien upon the portion of the road covered by the contract, followed.

Appeal from Davis Circuit Court.

THURSDAY, JUNE 9.

THIS is an action in equity, the object of which is to enforce the performance of a certain written contract of which the following is a copy:

"I, Thomas Davies, owner of the following described real estate, to-wit: w hf of nw qr and nw qr of sw qr of sec 34, and se qr of ne qr of sec 23, tp 59, range 14, for the consid.

Davies v. The St. L., K. C., & N. R. Co.

eration of one dollar, to be paid me at any time within five years, do hereby agree to grant a right of way to the St. Louis & Cedar Rapids Railway Co., for their said road through and across the land above described, said right of way to be fifty feet on each side of the center line of said railway as now located. And I do hereby authorize said company to enter upon, construct, and operate said railway, and this agreement to hold good until a deed is executed, subject to conditions following: That said company give me a suitable wagon crossing over and across said road, at two places on said premises, and keep the same in repair; also a convenient passway for stock at and to a watering place on the sw corner of nw qr sw qr sec 24, tp 69, range 14.

THOS. DAVIES."

The railroad was built over and across said land in 1867, by the said St. Louis & Cedar Rapids Railroad Company. Afterwards, the defendant, The Saint Louis, Ottumwa & Cedar Rapids Railroad Company, became the owner of said road by purchase, and in May, 1876, the said company leased the road to the defendant, St. Louis, Kansas City & Northern Railroad Company, and said last named company was at the commencement of the suit operating the road under said lease. The crossings and passway for stock provided for in the contract have never been constructed.

The cause was tried upon written evidence, and a decree was entered finding that the plaintiffs, who are now the owners of the land, were damaged by the failure of the Saint Louis & Cedar Rapids Railroad Company to comply with said contract in the sum of \$340, and that the cost of the structures to be constructed under the contract is \$412.82. Judgment was rendered against the St. Louis & Cedar Rapids Company for said amounts of money, and the judgment was declared to be a lien on the land appropriated for the right of way, and the rights of the defendants were foreclosed, and special execution ordered for the sale of said right

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of way, embankments, ties, rails, etc., in payment of said judgment.

It was further provided in said decree that any or all of the defendants might at any time previous to February 20, 1880, construct the passage way for stock and the two wagon crossings in certain places which were definitely fixed in the decree, and that if so built within said time the judgment should be credited with the said sum of \$412.80, the estimated cost thereof. The defendants appeal.

Trimble, Carruthers & Trimble, for appellants.

Traverse, Payne & Eichelberger, for appellee.

ROTHROCK, J.—I. The questions discussed by counsel pertaining to the rights and liabilities of the defendants under the contract, as to the correctness of the decree in ordering a sale of the right of way in satisfaction of the judgment, and as to the damages arising from the failure of the defendants to construct the crossings being considered as part of the consideration of the contract, have all been determined adversely to the defendants in *Varnier* against these same parties. 55 Iowa, 677. It is unnecessary to repeat the grounds upon which that decision is based.

II. It is claimed by counsel for the appellants that one of the crossings provided for by the decree is fixed at a place where it will require an unnecessary expenditure to construct it. An examination of the evidence satisfies us that it is the proper place for a "suitable crossing," as provided for in the contract. It is also urged that the damages found by the court are excessive. We think that under the evidence the amount is reasonable, and fairly within the bounds of the testimony as given by the witnesses.

As there is nothing in the record indicating that this appeal was taken for delay, the defendants will be allowed ninety days after the filing of this opinion to construct the crossings and passway for stock as provided in the decree of the

The State v. Montgomery.

court below. In default of their completion within that time, the special execution will issue. The decree of the Circuit Court is

AFFIRMED.

THE STATE V. MONTGOMERY.

1. **Criminal Law: FALSE PRETENSES: INDICTMENT.** An indictment for obtaining money under false pretenses considered and held sufficient.
2. —: —: **EVIDENCE.** Evidence of matters preceding the obtaining of money by false pretenses considered and held admissible as relating to a part of the transaction.
3. —: —: **WHAT CONSTITUTE.** While a false promise to repay will not alone sustain an indictment for obtaining money under false pretenses, it may, when coupled with a false representation as to property owned by the person making it.
4. —: —: —. The fact that a false representation made by a defendant was not such as would deceive a shrewd and experienced man will not constitute a defense, when the person intended to be deceived thereby was in fact deceived.

56	195
86	222
56	195
112	20
56	195
113	702
56	195
128	549
56	195
132	473

Appeal from Wapello District Court.

THURSDAY, JUNE 9.

THE defendant, H. A. Montgomery, was convicted of the crime of obtaining money under false pretenses, of one Frizzell. Judgment having been rendered upon the verdict, he appeals.

Morris J. Williams, for appellant.

Smith McPherson, Attorney General, for the State.

ADAMS, CH. J. The defendant demurred to the indictment. The demurrer was overruled, and the defendant assigns the overruling as error.

1. CRIMINAL
law: false
pretenses: indict-
ment.

The defendant was indicted jointly with one Thomas Davis. The indictment charges that

The State v. Montgomery.

Montgomery and Davis, by false pretenses and with intent to defraud, obtained eighteen dollars from Frizzell; that they falsely represented to Frizzell that Davis had certain goods in possession of the Wabash, St. Louis & Pacific Railroad Co., at Ottumwa, Iowa, to be shipped to Sedalia, Mo., on the same train with Frizzell, and would return said money to said Frizzell when they got to Booneville, Mo.; that said Davis had no goods in possession of said railroad company, and had no freight to pay to said company for the transportation of goods or property; that upon representations so made said Frizzell was induced to part with his said money, believing such representations to be true, when in fact they were false, and were made designedly, and with intent to defraud said Frizzell.

The first objection raised to the indictment is that it is not shown that the goods had any value.

We think it was not necessary to charge that the goods had value. The theory of the charge is not that Frizzell was induced to part with his money in reliance upon the goods as security, but by reason of the supposed exigency of a fellow traveler.

It is objected further that the indictment does not show that Davis had no goods, but merely that he had no goods in the possession of the railroad company. To this we think that the same answer may be made as to the first objection.

It is further objected that the said false pretense is frivolous, and would deceive no one who was not imbecile. Yet the indictment charges, in substance, that the false pretense did deceive Frizzell; that it was made with the design of obtaining his money, and that it had that effect. In our opinion the indictment is sufficient.

The defendant assigns as error the admission of certain evidence. As preliminary to the consideration of it, it is necessary to state in a general way the facts of the case as disclosed by the evidence.

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The prosecuting witness, Frizzell, was a resident of Des Moines. On the 9th day of August, 1880, he was at Ottumwa, on his way to Texas. While waiting at the depot for passage by railroad, the man Davis, who is indicted jointly with the defendant, approached him and entered into conversation with him, with the evident purpose of making his acquaintance and gaining his confidence, saying among other things that he was going upon the same train, and suggested that they travel together. Afterwards Davis went away, but he returned before train time. What he went for is only a matter of conjecture. Before the train was ready to start he suggested to Frizzell that they go aboard and get a seat before the cars became crowded. Soon after they had taken their seats the defendant came to Davis and sat down near him. Davis introduced Frizzell to him, and defendant asked Davis if Frizzell was a friend of his, and Davis replied that he was. The defendant then asked Davis to pay the freight on his goods which were to be shipped with him. Thereupon Davis took out of his pocket-book a check upon the bank of Booneville, and offered the same to the defendant, which the defendant declined to take. Booneville, it appears, was upon the road and Frizzell was going there. When the defendant refused to take the check, Davis applied to Frizzell to aid him by advancing him money, promising to repay him when they reached Booneville. Frizzell advanced the money, which Davis delivered to the defendant. Davis then demanded of the defendant a receipt. The defendant had no receipt to give him, and so he asked him to step out with him and get a receipt, and suggested that in the mean time Frizzell should keep his seat for him. Frizzell kept Davis' seat for him but he did not return. The train having started without Davis, Frizzell reported the matter to the conductor, who stopped the train and let Frizzell off, and Frizzell went back to Ottumwa. Davis had no goods to pay freight on, nor in the hands of the company.

The first evidence objected to by the defendant is the tes-

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timony of Frizzell as to what Davis said when they first met
 2. —: —: at the depot, where Davis sought Frizzell's ac-
 evidence. quittance, representing that he was going upon
 the same train, and had some goods which he was shipping,
 and suggesting that they travel together.

The objection urged is that the defendant was not present,
 and Frizzell had not seen him at that time, and that it is not
 shown that Davis and the defendant were at that time acting
 in concert.

To this we think it sufficient to say that there is good
 ground for believing that the first interview at the depot was
 a part of the scheme whereby Frizzell was decoyed into part-
 ing with his money, which passed into the defendant's hands
 through a supposed loan to Davis. It cannot be doubted
 that the defendant came aboard of the cars through a previ-
 ous arrangement with Davis, consummated at the time Davis
 absented himself from Frizzell after having made his ac-
 quittance at the depot. The defendant undoubtedly came
 to garner the fruits of that acquaintance, and we think that
 there was no error in allowing evidence of what was said by
 which the acquaintance was made, and the confidence of Friz-
 zell was gained.

The court gave an instruction in these words: "Money
 obtained of another under a promise to repay it, without
 other representation, although the party obtain-
 3. —: —: ing the money has no intention to repay it, it is
 what consti- tute. not such false pretense or representation as to
 constitute a crime. But the promise to repay the money
 coupled with false representations as to property, made with
 intent to defraud, and which is relied upon, is such false pre-
 tense."

The defendant objects to this instruction and insists that a
 false promise can in no event be a false pretense.

Doubtless the crime in question is not committed without
 a false statement in regard to an existing fact. But the
 false statement may become effective and criminal only by

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being coupled with a false promise; and where that is so we have no doubt that the false statement and the false promise may be considered together as constituting the false pretense. That appears to us to be the doctrine of the instruction, and we think it correct.

The court gave an instruction in these words: "If you find from the evidence that the alleged false pretenses named in the indictment are substantially proven as laid, then you should find the defendant guilty."

The defendant objects to this instruction. He insists that, taken together with the other above set out, it was calculated to mislead the jury, and cause them to believe that if they found the false promise proven, they would be justified in finding the defendant guilty.

But the court expressly told the jury that a false promise alone would not constitute the crime. We do not see how the court could have said more upon that point.

The court gave an instruction in these words: "If you find from the evidence that the defendant and Davis, acting in concert, designedly made the representations substantially as set out in the indictment; that such representations were false and untrue; that they were made with the intent to defraud Frizzell, and that by said false representations he obtained from said Frizzell the sum of eighteen dollars, and that said false representations were made in Wapello county, Iowa, and you further find that all said matters have been established by the evidence beyond a reasonable doubt, then you should convict the defendant; but if you are not so satisfied beyond a reasonable doubt, then you should acquit the defendant."

The defendant objects to this instruction. He insists that it proceeds upon the theory that the jury should convict, if the false pretenses were proven, however frivolous they may be.

We can conceive that alleged false pretenses might be so frivolous as to preclude the supposition that any person could

be misled by them and induced thereby to part with his money. But this is certainly not such a case. The court was fully justified in submitting the question as to whether the defendant obtained Frizzell's money by the false representations. It is true that these representations were not such as would probably have induced a shrewd and experienced man to part with his money. The criminal classes, it may be presumed, do not usually approach such men with such methods. But they were well calculated, we think, to mislead and defraud some men. At all events it was a fair question for the jury as to whether they believed that Frizzell was defrauded by them, and this question was fairly submitted. If Frizzell was defrauded by the false pretenses, they are not to be regarded as frivolous as to him. We see no error in the instruction.

The court instructed the jury that in determining whether the pretenses were frivolous, they should "look at the age of 4. —: —: Frizzell, his experience and general knowledge, —: —: his health, and all the evidence bearing upon that subject."

The defendant objects to this instruction. He insists that the instruction means that if Frizzell was a child, or imbecile by reason of bad health, any representation would be sufficient to justify a verdict of guilty.

But the defendant's interpretation of the instruction is a clear perversion of it. The jury was entitled to consider Frizzell's age, etc., in determining whether he was actually misled and defrauded. If he was thus defrauded the jury would not have been justified in regarding the false pretenses as frivolous, and acquitting upon that ground. We ought certainly to adopt no rule which should make the young, the inexperienced, and the half-witted, the legitimate prey of criminals.

The defendant complains that the instructions given ignore the idea that Frizzell was bound to make any effort to learn the truth of the statement made to him. In support of his

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position that such idea should not have been ignored, he cites *State v. Young*, 76 N. C., 258. In that case the court said: "A false statement that a house and lot are unincumbered, when in fact they were subject to a recorded mortgage, is not a false pretense within the meaning of the statute, because the party defrauded had the means of detection at hand, and might have protected himself in the exercise of common prudence."

But that case bears very little resemblance to the case at bar. In that case there was an actual borrowing of money, and a *bona fide* intent, doubtless, to repay. The false representation went merely to the condition and value of the security. In the case at bar the jury was justified in believing that the borrowing was a mere pretense.

The defendant insists that the verdict should have been set aside as against the evidence, because Frizzell testified that he did not rely upon the property.

It is a matter of course that he did not rely upon the property as security. He parted with his money under the supposition that he was assisting a fellow-traveler in an emergency. The emergency had no existence, and Davis was not a fellow-traveler, and the defendant knew it. The verdict, in our opinion, was abundantly sustained by the evidence. We see no error, and the judgment must be

AFFIRMED.

THE STATE V. DAVIS.

1. **Criminal Law: FALSE PRETENCES: EVIDENCE.** The *State v. Montgomery*, ante, 195, followed. Error in the admission of immaterial evidence held to be cured by its prompt exclusion from the jury.

Appeal from Wapello District Court.

THURSDAY, JUNE 9.

THE defendant, Thomas Davis, was convicted of the crime of obtaining money under false pretences of one Frizzell. Judgment having been rendered upon the verdict he appeals.

Morris J. Williams, for appellant.

Smith McPherson, Attorney General, for the State.

ADAMS, CH. J.—The defendant was indicted jointly with one H. A. Montgomery. The questions presented are for the most part the same as those presented in the case of the *State v. Montgomery*, decided at the present term, ante, 195. The defendant, however, presents two additional questions upon the admission of evidence. Before proceeding to the consideration of them we will state that for a proper understanding of the case reference should be had to the case of the *State v. Montgomery*, where a portion of the indictment and the leading facts are set out.

In the case at bar, however, one McGrew was examined as a witness. He testified that he was a banker; that Montgomery came into the bank; that he asked him what he wanted; that Montgomery had no particular business, but finally bought a revenue stamp. The witness then testified against the defendant's objection that there was something about Montgomery that attracted his attention.

It appears to us that this testimony was immaterial, but we are not able to say that it was prejudicial.

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One Robinson, the officer who arrested Montgomery and Davis, was examined as a witness, and was allowed to testify, against the objection of the defendant, that he searched Montgomery and found skeleton keys upon him. Immediately, however, upon further objection being interposed, the court excluded the testimony from the jury.

It is clear that the evidence should not have been admitted, but the prompt exclusion of the evidence we think cured the error. In our opinion the case was fairly tried and the judgment must be

AFFIRMED.

THE STATE V. GLEASON.

1. **Criminal Law: LARCENY: FORMER CONVICTION.** A conviction for petit larceny before a justice of the peace is a bar to a subsequent prosecution on indictment for larceny from the person, based on the same act.

56	203
127	306
56	203
143	568

Appeal from Polk District Court.

THURSDAY, JUNE 9.

INDICTMENT charging that the defendant one silver half dollar and three silver ten cent pieces, * * * of the aggregate value of eighty cents, and one pocketbook of the value of one dollar, * * * of the goods and chattels of Mrs. E. E. Updyke, from the person of said Mrs. E. E. Updyke unlawfully and feloniously did steal, take, and carry away. The defendant pleaded not guilty, and a former conviction for the same offense before a justice of the peace. To the latter the State demurred, which was sustained, and there was a trial before a jury on the issue of not guilty.

There was a verdict of guilty and judgment sentencing the defendant to imprisonment in the penitentiary for one year, and he appeals.

M. D. McHenry, for the appellant.

Smith McPherson, Attorney General, for the State.

SEEVERS, J. The defendant pleaded a former conviction, as follows: "That as to the alleged stealing of the money and in this indictment charged against him, he was on — day of September, 1880, charged by information on oath in due form before John A. Jones, a justice of the peace for Polk county, Iowa, and being arrested plead to said charge, and the said cause coming on for trial before said justice a judgment of conviction was rendered against this defendant by said justice, and he was ordered by said judgment to pay a fine of twenty dollars and costs, thirteen dollars of which fine and cost s he then and there paid and was discharged. And the defendant says that the said charge was and is the same charge of stealing which is preferred against him in the indictment, and he is the same person who was prosecuted and fined as aforesaid before the said Jones.

And the defendant further says that the prosecution before the justice of the peace was not procured by him, was not in any wise fraudulent or collusive, and that he was arrested, charged and fined at the instance of prosecutors who were and are in nowise in his interest, and this he is ready to verify. The defendant brings now here into court attached hereto the said information which charged "that the defendant did feloniously steal, take and carry away of the property of Mrs. E. E. Updyke, money to the amount of eighty cents in silver, one pocket-book of the value of three dollars."

To the foregoing plea of former conviction the State demurred on the following grounds:

1. The indictment charges larceny from the person and defendant was charged and convicted of petit larceny.
2. The offense charged is not the offense for which defendant was convicted.

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3. The justice had no jurisdiction of the offense charged in the indictment and could not convict him thereof.

The defendant was charged and convicted before the justice with the crime of petit larceny, which is a misdemeanor punishable by fine or imprisonment in the county jail. The indictment charges larceny from the person, which is a felony. The statute defining the crime is as follows: "If any person commit the crime of larceny by stealing from any building on fire, or by stealing any property removed in consequence of an alarm caused by fire, or by stealing from the person of another, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years." Code § 3905.

In the *State v. Foster*, 33 Iowa, 525, it was held that a conviction before a justice of the peace on a charge of assault and battery was not a bar to an indictment for assault with intent to commit a great bodily injury, based on the same transaction. The correctness of this decision cannot, we think, be successfully denied, because the person charged was not tried before the justice for the intent with which the assault was committed. The intent originated with and was the act of the defendant. He alone was responsible therefor. The intent graded the crime, or rather because of it there were two crimes.

So in robbery. For there must be force and violence or putting in fear. Therefore it may be said a conviction for the larceny would not bar an indictment for the robbery because the person charged had not been punished for the whole thing—crime or crimes committed. This is true also as to a breaking with intent to commit larceny, when the offender has been acquitted or convicted of the larceny only.

Now in the case at bar it was not essential in order there should be a conviction under the indictment that an assault should be established. It is, however, difficult to see how there could be a larceny from the person without a technical assault. We apprehend, however, if a person should be sleeping on the ground, with a hat lying loosely over his face,

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the crime would be complete if another should steal and carry away the hat without disturbing the sleeper. Other cases of a like character might be suggested. The intent is and must be the same if the larceny be by stealing from the person or from a house or other place. The intent is the same in grand and petit larceny. *The State v. Murray*, 55 Iowa, 530. Stealing from the person is larceny and nothing more—it is so designated in the statute. For the larceny the defendant was tried and convicted by the justice of the peace.

Suppose a person rightfully enters a building on fire and feloniously steals and carries away property and is charged and convicted with the larceny, should he be again punished because the building was on fire, or if punished for stealing goods removed in consequence of a fire, should he be again punished for the same thing.

In Minnesota there is a statute making it a felony if larceny is committed by stealing from a shop. In the *State v. Wiles*, (Minn.) 4 N. W. Rep., 615, the defendant was indicted under the statute aforesaid for stealing a hat from a shop. The defendant pleaded a former conviction for the same larceny before a justice of the peace. It was held this was a bar and he could not be again prosecuted.

In this case the only intent on the part of the defendant was to commit larceny, and as he had been punished for all that he did or intended to do, it was held he could not be again punished for the same offense.

The statute creates the offense and declares the punishment. The defendant committed the offense and the State in the first instance failed to charge or allege a fact which would if established have increased the punishment. But such fact was not caused by anything done by the defendant. The extent of the punishment cannot, we think, grade the crime or create two offenses, so that the defendant can be twice punished for the same transaction. Before this can be done the defendant must have done something with an intent for

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which he has not been punished, or because of the act done, it can be said two offenses were embraced therein.

Beyond doubt, we think, if the defendant had been acquitted when tried before the justice, this should be a bar to another prosecution for stealing from the person, because if he was not guilty of larceny he could not be of stealing from the person. The defendant, therefore, could not be convicted in this case unless the State established the larceny, and for this he has been punished. The demurrer should have been overruled.

REVERSED.

 KYSER V. THE K. C., ST. J. & C. B. R. CO.

1. **Railroads: INJURY TO STOCK: EVIDENCE.** A paper shown to be similar to an affidavit of the killing of stock, served on a railroad company, but not a copy, is not admissible to prove the contents of the affidavit.
2. —: ——. A railroad company is not liable in damages, under the statute, for stock killed by its trains on depot grounds.

Appeal from Pottawattamie Circuit Court.

THURSDAY, JUNE 9.

ACTION commenced before a justice of the peace to recover double the value of a cow killed by a train of cars upon defendant's railroad. The cause was appealed to the Circuit Court, where a verdict and judgment were had for plaintiffs, for double the value of the cow. Defendant appeals. The facts of the case involved in the points ruled appear in the opinion.

Sapp, Lyman & Ament, for appellant.

Wm. McLennon, for appellee.

56 207
106 92

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BECK, J.—I. The evidence in the court below establishes that the plaintiff served upon the agent of defendant a notice and an affidavit, showing the destruction of the injury to stock: evidence. cow. An affidavit and notice, introduced in evidence, were shown to be *similar* to the paper served on the agent. The plaintiff, it seems, signed and was sworn to two papers, embodying the notice and affidavit required by the statute in such cases. One of them was served upon the agent, the other introduced in evidence. The proof shows that these several papers were *similar*; it does not show that they were identical in form and substance, or that one is a copy of the other. Under Code, section 1289, the original affidavit must be served upon a railroad company or its agent and a copy introduced in evidence, unless other lawful evidence is admissible in lieu of a copy under the circumstances of the case. *McNaught v. C. & N. W. R. R. Co.*, 30 Iowa, 336. A paper similar to the original affidavit is not sufficient evidence under this rule.

II. The evidence shows that the cow was killed upon the grounds of a station, where there was a switch and side track. The court, in instructions to the jury, 2 —: —, held that the plaintiff is entitled to recover upon proof made by him that his property was destroyed by a train of cars upon defendant's road, and that defendant to escape liability must show that the part of the station ground where the cow was killed was necessary and convenient for the transaction of the business of the railroad. The decision of the court below is in conflict with the rule recognized by this court. It is held in *Comstock v. The Des Moines Valley R. R. Co.*, 32 Iowa, 376, that in an action to recover for stock killed by a train upon a railroad, the burden rests upon the plaintiff to show that the injury was done at a point where the company is required to fence its track. A railroad company is not required to fence its track upon depot grounds. See *Cleveland v. The C. & N. W. R. R. Co.*, 35 Iowa, 220, and *Smith v. The C. R. I. & P.*

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R. R. Co., 34 Iowa, 506, and cases therein cited. The announcement of the foregoing rules sufficiently answers all the questions certified by the Circuit Court for our decision.

The rulings and decision of the court below being in conflict with the views we have expressed, its judgment is

REVERSED.

BROWN V. PETRIE ET AL.

1. **Practice in the Supreme Court: APPEAL: JUDGE'S CERTIFICATE.**
The certificate of the trial judge, in a case involving less than one hundred dollars, held insufficient to raise any question for the consideration of the Supreme Court.

Appeal from Hardin Circuit Court.

FRIDAY, JUNE 10.

ACTION to recover for trespass to real estate. Judgment was rendered for the defendants. The plaintiff appeals.

S. M. Weaver and *T. H. Milner*, for appellant.

William V. Allen, for appellee.

ADAMS, CH. J.—The amount claimed being less than one hundred dollars, the case comes to us upon a certificate in which the questions certified are as follows:

“1. Under the facts as shown by the evidence on the part of the plaintiff, has said plaintiff such possession of the land described in the petition as will enable him to maintain this action?

“2. Under the pleadings herein, and the facts as shown by the evidence, has the plaintiff such possession, or right, title or interest in the land or possession as will enable him to maintain an action against a stranger trespassing thereon?

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The appellee insists that these questions present nothing for our determination.

In our opinion the position is well taken. The action is at law and it is not our province to determine questions of fact in such actions, even if the amount involved was sufficient to give us jurisdiction.

While the questions certified seem upon their face to call for an opinion upon the weight of evidence, we have to say that upon looking into the record we discover that a jury was impaneled, and after the plaintiff had introduced his evidence the court took the case from the jury and rendered judgment for the defendants.

This leads us to conclude that there was doubt in the mind of the court as to whether there was any evidence upon which a right of recovery could be based, and that this doubt was of a legal character, that is, as to whether one or more facts proven beyond dispute constituted any evidence in the plaintiff's favor.

But it is certain that no such question is properly certified to us. The plaintiff may rely upon many facts which in the mind of the court are so clearly immaterial that it never thought of asking for an opinion of this court upon them. The questions certified, then, should have embraced specific facts. In no other way could we be sure of determining the questions of law which the court had in mind.

The appellant argues the case precisely as if it was presented to us as a whole. Possibly the questions certified were drawn by appellant's counsel, and were designed to operate as a complete drag net, and enable him to raise every question discovered or discoverable in the case. Such a practice, if allowed, would be a complete evasion of the statute, and rule based thereon, requiring the certification of the question of law upon which the court below deems it desirable to have the opinion of this court. We think that the appeal must be

Dismissed.

GILBERT, HEDGE & CO. v. GREENBAUM, SCHRODER & CO. ET AL.

1. **Landlord and Tenant: LIEN FOR RENT: WHEN IT ATTACHES.** Under the statute a landlord's lien for rent for the entire term of the lease attaches to property used on the leased premises at the time such property is brought thereon, although it may not be enforceable as to rent not due, so long as the business of the tenant is conducted in the usual manner, and as contemplated by the lease.
2. —: —: **WHEN ENFORCEABLE.** Where a building was leased as a store-room, and occupied with a stock of merchandise, it was held that the execution of a mortgage on the stock by the tenant rendered the lien of the landlord for the rent of the entire unexpired term of the lease enforceable, and that such lien was superior to that of the mortgage.
3. —: —: **EFFECT OF RECEIVERSHIP.** The lien of a landlord will not be defeated by the conversion of the property of a tenant into money by a receiver, under an order of court, but will attach to the proceeds in the receiver's hands.

Appeal from Des Moines District Court.

FRIDAY, JUNE 10.

ACTION in chancery to enforce a landlord's lien. Certain of the defendants filed a cross bill, to which plaintiffs demurred. The demurrer was sustained, and the defendants declining to plead further, and electing to stand on their cross bill, it was dismissed. Defendants appeal.

P. Henry Smyth & Son and *Newman & Blake*, for appellants.

Hedge & Blythe, for appellees.

BECK, J.—I. The plaintiffs allege in their petition that in December, 1873, they leased, by a written instrument, a certain store building, in the City of Burlington, which they were about to erect, to defendants Greenbaum, Schroder & Co., for the term of ten years from the completion of the building, and that the defendants entered and occupied the

56	211
85	47
56	211
87	61
56	211
95	293
56	211
106	310
56	211
107	731

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building under the lease. It is further shown by the petition and lease, a copy whereof is made an exhibit in the case, that defendants were to occupy the premises for no other purpose than as a dry goods store, and were not to under let, except with the written assent of plaintiffs; that the rent provided for was \$4,500 per annum, for the first five years, and \$5,000 per year for the remainder of the term, to be paid quarterly, and that the rent has been voluntarily, and without consideration, reduced by plaintiffs, to the sum of \$3,200 per annum. Other terms of the lease need not be recited. The petition shows that the stock of goods kept by defendants in the building has been, by sale and depreciation in value, greatly reduced, so that the value thereof is less than \$20,000, and defendants are not replenishing their stock, but constantly and rapidly diminishing it; that defendants are insolvent, and plaintiffs have no security for the rents accruing and to accrue, except the goods belonging to defendants found in the building. It is further shown that Greenbaum, Schroder & Co. executed a chattel mortgage to Landaurer, Treudenthal and Rabb, in trust, to secure the mortgagees, and certain other creditors of the mortgagors, whose claims aggregate the sum of \$39,167.74. The mortgage has been duly delivered and recorded, and upon its face purports to be a conveyance of the goods now upon the leased property. It is provided in the mortgage that it shall cover all new stocks purchased, which shall be held for use of the trust provided for in the mortgage. The mortgage further provides that upon the failure of the mortgagors to pay the claims secured, within one year, the mortgagees may take possession of the goods covered by the mortgage. It is alleged in the petition that the mortgagors and creditors intend to sell the goods on hand at the date of the mortgage, and replace them with new goods, and, in this way, to defeat the landlord's lien held by plaintiffs. The mortgagees and creditors secured by the mortgage are made defendants. Plaintiffs pray that Greenbaum, Schroder & Co. may be enjoined from the sale of the goods.

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now upon the premises, until they shall pay the rent due, or to become due to plaintiffs, and that such other relief be granted as equity may require. The petition was filed June 23, 1879.

On the 24th of May, 1880, the mortgagees, as trustees for themselves and others, filed their answer and a cross bill.

They allege in the cross bill that they acquired the legal title of the goods described in the mortgage, as well as all other goods added thereto by the mortgagors, and that when the mortgage was executed there was no rent due plaintiffs. It is further shown by the cross bill that certain creditors of Greenbaum, Schroder & Co., other than those secured by mortgage, commenced action on their claims, and a temporary receiver was appointed to take possession of the goods; that afterwards E. S. Taylor was appointed receiver, and was authorized by the order of the court to continue the business by selling off the stock and replenishing the same, so far as was necessary to conduct the business; that on the 31st day of March, 1880, the receiver finally closed the business of the store, having disposed of all the goods. He paid to plaintiffs all the rent due to that day, and offered to give possession of the property by tendering the keys of the building, which were not accepted by plaintiffs, and that the receiver holds about \$25,000 in money, the net proceeds of the goods, subject to the order of the court. The defendants claim in their cross bill that the plaintiffs' lien continued only while the premises were occupied and used by the lessors; that when the property was sold and removed, under the order of the court, the lien terminated, and that the funds in the hands of the receiver should be appropriated to the payment of the debts secured by the mortgage; they ask for relief accordingly.

It is shown by an amended abstract that all the suits brought by the creditors, including plaintiffs' action, were consolidated on the 28th day of June, 1879, and on the same day the receiver was appointed. The order making the appointment provides that it shall be "without prejudice to the existing

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rights of any of the creditors, or the merits of the controversies between them or any of them." The plaintiffs' demurrer to the cross bill, on the ground that the facts alleged did not entitle defendants to the relief prayed for, was sustained. This ruling presents the following questions which are involved in the case, viz:

1. Have plaintiffs a landlord's lien under the statute for rent to accrue, or, in other words, does their lien attach to property of the tenant used upon the premises to secure rent which will fall due in the future, as provided in the lease?

2. Is the landlord's lien of plaintiffs defeated by the conversion of the goods into money, by the receiver, under order of the court?

II. The first question has been determined by more than one decision of this court. The precise point was decided in *Martin v. Stearns*, 52 Iowa, 345. We there held that the lien of the landlord attached to the property of the tenant used upon the premises for the rent of the entire term. The facts of that case are substantially similar to those of the case before us. The same rule is recognized in *Garner v. Cutting*, 32 Iowa, 547, and in *Grant v. Whitwell et al.*, 9 Iowa, 152. It must be regarded as the law of the State.

Counsel for defendants attempt to distinguish these cases, or the first two cited, from the case at bar, on the grounds that the tenants in those cases were either disposing of the property in a manner not in accord with the due course of trade, or with a fraudulent intent. In each case the property of the tenant had been transferred by a chattel mortgage. It was held these transfers would not defeat the landlord's lien for rent to accrue during the term. The decision is not placed upon the ground that the transfers were made in an unusual manner or for a fraudulent purpose, but upon the ground the landlord's lien attached to the property when it was brought upon the premises and could be enforced to prevent the transfer of the title of the property or its removal.

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We are unable to discover any reason or principle which supports the position of counsel that the lien will attach if ^{a. —: —: the property is about to be disposed of contrary} _{when enforcible.} to the usual course of business, and otherwise will not attach. The lien attaches as soon as the property is brought upon the premises. It may be that it will not be enforced as to rent not due, if the usual course of business is pursued by the tenant. This we presume is so when stocks of merchandise are concerned. But the disposition by absolute conveyance or by mortgage of a stock of merchandise cannot be regarded as in the usual course of business, as contemplated by the parties. If it is to be so regarded, then would the law provide for the defeat of the lien by the very act, the disposition by sale, against which the lien was provided to protect the landlord. It would be absurd indeed to provide for a lien on property to secure a present or future indebtedness, and to further provide that the lien may be defeated by the sale or mortgage of the property. The argument of defendants' counsel reaches this result.

III. The second question above stated now demands consideration.

It will be remembered that after plaintiffs filed their petition the receiver was appointed, upon the petition of certain ^{a. —: —: attaching creditors of Greenbaum, Schroder & Co.} _{effect of receivership.} There were three classes of creditors endeavoring to enforce liens held by them respectively against the goods, namely: Plaintiffs, the landlords; defendants, the mortgagees; and the attaching creditors. The court below, doubtless upon a proper showing, correctly reached the conclusion that the interest of the parties who should finally establish their liens, as well as the interests of the debtors, required the appointment of the receiver with the authority to continue the business of Greenbaum, Schroder & Co., until the property should be disposed of, and to hold the proceeds thereof subject to the order of the court. The court by this order put the goods into the custody of the law; thus

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depriving all parties of the possession while their rights thereto were being determined in the consolidated actions. Now it cannot be seriously urged that the appointment and acts of the receiver deprived plaintiffs or other parties of any right. The law would not surely cause a right to be lost by reason of proceedings which are provided for enforcing such a right. It is a familiar rule that when property is taken into the custody of the law, and converted into money by a receiver, the money takes the place of the property, and is distributed to the parties who establish their rights to the property. In this case the money in the hands of the receiver is to be regarded as representing the goods that were found by the receiver in the store, and must be distributed to the parties who show that they held liens upon the goods.

If these considerations leave doubts in the mind, they are surely removed by the language of the order appointing the receiver, which declares that "this order is without prejudice to the existing rights of any one of the creditors, or the merits of the controversies between them or any of them."

The foregoing discussion disposes of all points in the case. The judgment of the District Court is

AFFIRMED.

MUNGER V. THE CITY OF MARSHALLTOWN.

- 1. Negligence: WHAT IS CONTRIBUTORY: DEFECTIVE SIDEWALK.** An instruction as to contributory negligence, in an action to recover from a city for injuries received by reason of a defective sidewalk, considered and held erroneous.

Appeal from Marshall Circuit Court.

FRIDAY, JUNE 10.

THE plaintiff claims to have been injured by reason of a defective sidewalk, and this action was brought to recover

56	216
124	690
56	216
129	30

Munger v. The City of Marshalltown.

damages therefor. Trial by jury, verdict and judgment for plaintiff and defendant appeals.

B. L. Barrett, for appellant.

Henderson & Carney, for appellee.

SEEVERS, J. It was a material question in the trial of this action whether the plaintiff had been negligent, and therefore could not recover. The court on this branch of

1. NEGLIGENCE: what is contributory: defective sidewalk.

the case instructed the jury as follows:

“ 5. The plaintiff would be justified in relying upon the presumption that the defendant had done its duty in repairing any injury, if a reasonable time after the injury to the walk had elapsed before her use of it, and if she knew or ought to have known of the injury to the walk, she would be justified in using it, exercising such care, however, as seems reasonable. In view of her knowledge of its condition, and by the use of ordinary prudence, if she could not discover the fact that the plank was dangerous till she was so close to it as to be unable to avoid it she was not negligent. In order to render her negligent, preventing a recovery, she must have gone into the danger voluntarily, assuming the risk by stepping into the danger there apparent. If she did not know, or have reason to know, that the plank was loose she would not be required to presume there was danger in going upon it.”

To this instruction the defendant excepted, and it is now insisted that no reversible error was committed in giving it.

Negligence is the failure to use ordinary care, and it may exist when there has been carelessness, forgetfulness or a want of attention.

Now as we understand the foregoing instruction the danger must have been apparent, and the plaintiff must have voluntarily assumed the risk of being injured before she can be said to have been negligent. We have some hesitation as to the meaning of the word voluntarily in the connection in

 Rittgers v. Rittgers.

which it is used. There is no pretence the plaintiff could not have avoided, or that she was compelled to pass over, the defective sidewalk. We, therefore, think the court must have used the word aforesaid in the sense of knowingly. That is, that the plaintiff must have known of the apparent danger and assumed the risk before it can be said she was negligent. Now does the law require the danger should be apparent. That is, as we understand, obvious, plain or visible, as if the plaintiff saw the danger and voluntarily, that is, knowingly, "stepped into the danger apparent there." The true rule, we think, is that the plaintiff should have used due care and caution to discover the danger. The instruction given, we think, is erroneous.

Other objections are urged by the appellant, but none of them, we think, are well taken.

REVERSED.

56 218
d107 236

56 218
114 70

 RITTGERS V. RITTGERS ET AL.

1. **Will: CONSTRUCTION OF: TRUST: DOWER.** Where a decedent by will bequeathed all his property to his wife, to control the same and have all the profits arising therefrom, "for the purpose of raising, clothing, and educating" their children, until such time as the youngest child should attain a specified age, when the property was to be divided, it was held that under the will the widow took the property in trust, for the sole benefit of the children, and that she was entitled to have her distributive share set apart to her at once, under the statute, without relinquishing her trust under the will as to the remaining two-thirds.

Appeal from Polk Circuit Court.

FRIDAY, JUNE 10.

JACOB B. RITTGERS died on the seventeenth day of December, 1879, leaving the plaintiff, his widow, and nineteen children, six of whom were minors. On the third day of February, 1880, the last will of Jacob Rittgers was duly admitted

Rittgers v. Rittgers.

to probate. On the sixth of March, 1880, Catherine Rittgers filed her petition for assignment of dower, stating that although some provision is made for her in the will in lieu of dower, yet, so far as her interest in the real estate as widow is concerned, she elects to insist upon the interest given her, in her late husband's estate, by the laws of the State of Iowa. The court found that the plaintiff is entitled to have her distributive share in the real estate assigned. The adult defendants appeal.

St. John & Williams, for the plaintiff.

Bowen & Leavens, for the appellants.

W. S. Sickmon, guardian *ad litem*, for minor heirs.

DAY, J. The provisions of the will involved in this case are as follows:

"I bequeath to my wife, Catherine Rittgers, all of the real and personal property, moneys, and credits of which I may have at the time of my decease, to control the same and to have all the profits arising therefrom, for the purpose of raising, clothing, and educating the children born to us, until such time that Mary, our youngest child, shall attain the age of fifteen years, and then at that time, or as soon thereafter as can conveniently be done, of the property belonging to my estate, both real and personal, be sold and the proceeds thereof be equally divided between my wife, Catharine Rittgers, and my children who shall survive me, and of any children who shall have died between the time of my decease and the time of such division or distribution, to be entitled to such share or shares as their respective ancestors would have been entitled to receive if then living, and the share of my real and personal estate bequeathed to my wife to be in lieu of her dower."

1. WILL: construction of:
trust: dower.

As matter of law the court found:

"1. That the said Catharine Rittgers is not bound to re-

Rittgers v. Rittgers.

linquish the possession and control of the real and personal property of the decedent, prior to the time that Mary, the youngest daughter, shall attain the age of fifteen years, before she can renounce the provision made for her in the will, and elect to take her share under the statute; but that she has a right to hold the possession and control such property till the said Mary attains the age of fifteen years, in trust for the raising, support and education of the said minor children.

"2. That the said Catharine Rittgers is entitled to have one-third in value of all said real estate set apart to her in fee.

"3. That the remaining two-thirds of said real estate, and the profits therefrom, remain in the possession and control of the said Catharine Rittgers, in trust, till the said Mary attain the age of fifteen years."

We think the court placed the proper construction upon the terms of the will. It does not devise the profits of the real and personal property to the widow absolutely, but for a particular and specified purpose. The devise is "for the purpose of raising, clothing, and educating the children born to us." The children are the beneficiaries. The widow is the mere trustee for the purpose of executing the trust. It is clear to us that the children referred to have a right, under the provisions of this will, to insist that all the profits arising from the property in question shall be applied to their raising, clothing, and education. The widow could not waive the right to have the profits so applied, and hence this provision in the will is not inconsistent with her right to have her distributive share assigned under the law. Appellants concede if the use and profits of all the real estate and personal property of the decedent, between the time of his death and the time when the youngest child, Mary, shall become fifteen years of age, are, by the terms of the will, given to the widow, in trust, and she can have no personal advantage therefrom, that she is entitled to have one-third

Low v. Fox.

of the real estate set off to her, without relinquishing the trust. It is claimed, however, that the bequest of all the property for the term mentioned, and of the use and profits therefrom, is to the widow individually, and that she is to have the benefits thereof. This construction does violence to the language of the will, and ignores the portion which declares the purpose of the bequest.

It is claimed that the terms of the will are too indefinite and uncertain to create or be construed into a trust. Without elaborating this point we are of opinion that the will is not so indefinite or uncertain but that it may be enforced. The court properly held, we think, that the beneficiaries of the will are the minor children, yet to be raised, and for whose clothing and education the parents were responsible.

AFFIRMED.

 LOW ET AL. V. FOX.

1. **Practice in the Supreme Court:** ASSIGNMENT OF ERROR. An assignment of errors considered and held insufficient.
2. **Mortgage:** ASSIGNEE OF: FAILURE TO SATISFY OF RECORD. The assignee of a mortgage, by an assignment which does not appear of record, is not subject to the statutory penalty imposed on a mortgagee for a failure to enter a satisfaction of his mortgage upon the record when paid.
3. **Practice:** EFFECT OF GRANTING NEW TRIAL. The granting of a new trial operates to vacate the judgment rendered on the former trial, although it has been formally entered of record.

Appeal from Madison Circuit Court.

FRIDAY, JUNE 10.

Action upon an account. It is averred in the petition that the account originally accrued against defendant and in favor of Samuel Low, and that Samuel Low assigned the same to

56	221
91	46
56	221
96	698

 Low v. Fox.

E. H. Low, and that said account is now the property of the latter.

The defendant answered in denial of the claim made against him by the plaintiff, and by setting up an account against Samuel Low, and claiming judgment against him thereon. He also, by way of counter claim, set up a claim against said E. H. Low for \$25, based upon the following alleged facts: That in the year 1879 one Hoadly executed a chattel mortgage to one Ratliff; and that afterwards said Ratliff sold and assigned to E. H. Low the note which the chattel mortgage was given to secure; that defendant bought a part of the mortgaged property and assumed the payment of the note, and after paying the same demanded of E. H. Low that he should enter satisfaction of the mortgage, which he refused to do; and for such refusal the sum of \$25 is claimed as a statutory penalty.

There was a trial by jury, which resulted in two verdicts—one in favor of the defendant and against E. H. Low for the statutory penalty of \$25; and another in favor of the defendant and against Samuel Low for \$37.28. A motion for a new trial was made by the plaintiffs, which was sustained as to the verdict against E. H. Low, and overruled as to the verdict against Samuel Low. All of the parties appeal.

Polk & SeEVERS, for plaintiffs.

A. W. C. Weeks, for defendant.

ROTHROCK, J.—I. The judgment must be affirmed on the plaintiff's appeal, because of the insufficiency and inexplicit-
 ness of the assignment of errors. The only at-
 tempt at an assignment of errors found in the
 record is as follows:

1. PRACTICE
 in the su-
 preme court:
 assignment of
 errors.

"1st. Assignment of errors are that the court should have sustained in full the motion for new trial, and should have set aside both verdicts.

"2d. The other errors assigned are set out at length in

LOW v. FOX.

numbers two, three, four, five, six and seven of grounds for new trial on pages 12 and 13 of record."

It is scarcely necessary to say this assignment of errors is too general to meet the requirements of the statute, as interpreted by repeated decisions of this court.

II. The next inquiry is, did the court err in granting a new trial as to the verdict for the statutory penalty? The Code, section 3327, provides that "whenever the amount due on any mortgage is paid off, the mortgagee, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the mortgage, or by execution of an instrument in writing referring to the mortgage, and duly acknowledged and recorded. If he fails to do so within sixty days after being requested, he shall forfeit to the mortgagor the sum of twenty-five dollars." It will be observed that the liability for this penalty is against the mortgagee. E. H. Low was not the mortgagee. True, he was the assignee of the note secured by the mortgage, and it is undoubtedly correct that the assignment of the note operated as an assignment of the mortgage, so that he could enforce the mortgage for his benefit. But there being no written and recorded assignment of the mortgage to him his entry of satisfaction would have been improper, as tending to confusion in the record title to the property, by showing a release by a stranger to the instrument. Whether under the statute the assignee under a recorded assignment of a mortgage incurs the penalty by refusing to enter satisfaction we need not determine. We think that under the facts of the case the court was correct in granting a new trial as to the verdict under consideration, because under the undisputed facts the defendant could not recover.

It appears that a judgment had been formally entered on the verdict before the new trial was granted. It is urged that the granting of the new trial was erroneous, without setting aside the judgment. This objection goes rather to the form of the record than to

2. MORTGAGE:
assignment of:
failure to sat-
isfy of record.

3. PRACTICE:
effect of
granting new
trial.

Whitely v. Allen.

the substance of the case. The granting of a new trial *ex vi termini* was a vacation of the judgment entry.

Our conclusion is that upon both appeals the ruling of the court below should be

AFFIRMED.

WHITELY V. ALLEN.

- 1. Promissory Note: LIABILITY OF INDORSER: DEMAND.** Where the maker of a negotiable promissory note removes from the State before its maturity, leaving no one to represent him, no demand of payment is necessary to bind an indorser.

Appeal from Taylor Circuit Court.

FRIDAY, JUNE 10.

ACTION upon a promissory note. The suit was commenced before a justice of the peace, and it was averred in the petition that one Wilt executed the note to the defendant Allen, and afterwards, and before the maturity of the note, Allen indorsed it to one Houck, and that Houck indorsed it to the plaintiff: that at the time of the execution of said note Wilt, the maker thereof, resided in Taylor county, in this State, but that before it became due said Wilt removed his residence and place of business out of the State, and has ever since so resided, "stating at the time he so removed that he would in the future reside at Savannah, in the State of Missouri;" that such statement was made to the agent of the plaintiff; that said Wilt "left no one of whom a demand of payment could be made, and left no one authorized, empowered, or with means to pay said note when due, and was not himself there when said note was due and demandable; that plaintiff by writing letters to Savannah, Missouri, sought to find the whereabouts of said maker so as to make demand of payment; but such letters were returned by the

 Whitely v. Allen.

mail to the writer thereof (the agent of plaintiff), never having been taken from the postoffice, though properly directed, stamped and mailed, to said maker at Savannah, Missouri; that after said maker had so removed to Savannah, Missouri, he concealed his whereabouts from plaintiff;" that plaintiff was, and is, a resident of Springfield, Ohio, and had no knowledge of the facts, but such facts were wholly within the knowledge of the plaintiff's agent at Bedford in this State.

The defendant, Allen, demurred to the petition. The demurrer was sustained by the justice of the peace. The cause was removed to the Circuit Court by writ of error, and the ruling of the justice of the peace was sustained. Plaintiff appeals.

Whiffin & Brown, for appellant.

J. P. Flick, for appellee.

ROTHROCK, J. The promissory note which is the foundation of the action is negotiable, and in the usual form. The indorsement by Allen, the defendant, is as follows: "Pay E. Houck, without notice."

It is not claimed by the plaintiff that a demand was waived by the indorsement. It seems to be conceded that a waiver of notice does not excuse a demand, and such appears to be the law. *Voorhies v. Atles*, 29 Iowa, 49, and authorities there cited.

The amount in controversy being less than \$100, we are required by the certificate of the trial judge to determine the single question, whether, under the averments of the petition, the plaintiffs should be excused from making demand of payment of the maker of the note.

In *Parsons on Notes and Bills*, Vol. 1. P. 45., it is said: "If the maker removes from the place in which he resided and transacted business, to another jurisdiction, between the time a note is made and its maturity, the holder will not be

 Whitely v. Allen.

obliged to go out of his own State in order to make a demand, either on the maker personally or at his new place of business, or of residence. Whether it will be necessary for the holder to use due diligence to find the maker's last and usual place of business, or of residence in the place which he has left, is unsettled, the authorities being conflicting. But we consider that it is more in accordance with the rules of law respecting demand to require that the holder should endeavor to find this last place of business or abode, and present the note there." The reason of the learned author for this view is "that it is no unfair or unreasonable presumption that the maker left, at his place of business within the State, means and arrangements for attending to the business which he began there, and left unfinished there." A number of cases are cited in a note to the above quotation from the text. Some of these cases hold that the removal of the maker into another State after the execution of the note, and before its maturity, *ipso facto*, excuses a demand at the place of business or residence of the maker at the time the note was made. Others hold that demand should be made at the last residence or place of business within the State.

The facts of this case do not require us to adopt either of these lines of decisions. The petition shows affirmatively that the maker left no one at his last usual place of residence in Iowa "of whom a demand for payment could be made, and left no one authorized or empowered, or with means to pay said note when due * * * * * ." If the law requires a demand in all cases, and under all possible circumstances, it might properly be said that, the rule being inflexible, there can be no excuse for want of demand at some place. But the law requires that the holder shall do no more than exercise due diligence to make the demand. It does not require that the maker should be followed into another State, and it seems to us if it affirmatively appears, as it does in this case, that the maker has left behind him no one to represent him or answer for him in any capacity, the law should not

Rodefer v. Myers.

require the idle ceremony of a demand upon a mere stranger who may choose to be occupying the late residence, or it may be upon the empty walls of an untenanted house. In our opinion the demurrer to the petition should have been overruled.

REVERSED.

RODEFER v. MYERS.

1. **Pleading: ANSWER: DENIAL.** The allegations of an answer in an action on account considered and held not to put in issue the correctness of the account set out in the petition except as to certain specific items.

Appeal from Pottawattamie Circuit Court.

FRIDAY, JUNE 10.

THE plaintiff is a wholesale dealer, and the defendant is a retail dealer, in coal, lime, cement, etc., at Council Bluffs. On the 19th day of August, 1879, they entered into a contract as follows: "This agreement, made between J. W. Rodefer and J. E. Myers, witnesseth: That for the consideration hereinafter found, the said J. W. Rodefer agrees to furnish and deliver, if so required, any and all goods, wares and merchandise in which he deals to the said J. E. Myers, or on his order, at the net cost of the same to him, the said Rodefer, in Council Bluffs, Iowa, and in such quantities and at such times as the said Myers shall require, the same to be charged to him at such net price; and the said Myers hereby agrees in consideration thereof to pay to said Rodefer on or before the 10th day of the month next following the date of all purchases made or orders given and filled as aforesaid (except such goods, wares and merchandise as may be on hand in yard of said Myers, which shall be paid for at the expiration of this contract) the said net cost price of said articles so purchased and received on orders in cash, together

Rodefer v. Myers.

with five per cent on the gross sales of said goods as sold and ordered sold by the said Myers. The said net price and cost by him paid is to be fixed and agreed upon from time to time between the parties hereto from showings of net cost by the said Rodefer. And in consideration of the foregoing the said Myers agrees and binds himself to use his best efforts to work up and continue as large and the best trade possible in the articles so dealt in by the said Rodefer, and handle no goods of the same kind, provided that the said Rodefer will furnish said goods at as low a price as can be bought of other responsible parties. This agreement to take effect September 1, 1879. This agreement to be in force till August 1, 1880."

On the 12th day of January, 1880, the plaintiff filed his petition alleging that under the terms of this contract the plaintiff sold and delivered to the defendant the goods, wares, and merchandise mentioned in a bill of particulars, and that the defendant is indebted to plaintiff on said account in the sum of \$1,119.22. Attached to the petition as an exhibit is an itemized statement of account, with credits, showing a balance due of \$1,190.23. The defendant filed an answer as follows:

"He denies that plaintiff has performed the conditions of the contract set out as "Exhibit A" to said petition; denies that he has furnished and delivered as required by defendant, goods, wares and merchandise in which plaintiff deals to the defendant, or on his order, at net cost of the same to plaintiff in Council Bluffs, Iowa; denies that the prices charged in "Exhibit B" attached to the petition are the net cost prices provided in said contract; denies that the articles set out in said "Exhibit B" were furnished defendant by plaintiff under the terms of said contract; denies that the defendant is indebted to the plaintiff in the sum of \$1190 and 23 cents; denies that the defendant has refused to pay the plaintiff any sum due him, and denies that the account attached to the petition as "Exhibit B" is correct; especially denies that he

Rodefer v. Myers.

ever received the following articles set out in Exhibit B" from plaintiff, either under the contract sued on or in any other manner, to-wit:

Sept. 1.	1000	pounds	soft	coal	-	-	\$1.75
" 6.	779	"	"	"	-	-	1.15
" 11.	1000	"	"	"	-	-	1.50
" 17.	3000	"	stone	"	-	-	10.98
" 24.	2000	"	soft	"	-	-	3.00
Nov. 10.	Amt. charged for L. W. Babbitt acct.						

The plaintiff did not introduce his book of accounts. He testified that he sold to the defendant goods amounting to something near \$1,500; that defendant had paid thereon something near \$300, and that there was still due eleven hundred and ninety some dollars. He further testified that the goods were sold at the price stipulated in the contract—the net cost price at Council Bluffs. Upon cross-examination the witness was able to specify from memory the sale and delivery of only two items, amounting to \$3.25, and as to all the other items, he stated that he could not remember what he delivered, except as he got it from the books. The court instructed the jury that the itemized statement of account attached to the plaintiff's petition is not competent as evidence to show that any of the goods charged therein were delivered to the defendant under the contract. The jury returned a verdict for plaintiff for \$3.47. The plaintiff filed a motion for a new trial, which the court sustained.

The defendant appeals.

Sapp, Lyman & Ament, for appellant.

Rising, Wright & Baldwin, for appellee.

DAY, J.—I. From a careful examination of the answer it appears that it does not contain a positive and distinct de-

1. PLEADING: nial that any of the items of the account were
 answer: furnished, except as to the six items specified in
 denial.

Rodefer v. Myers.

the answer. The answer denies that plaintiff furnished goods, wares and merchandise in which plaintiff deals, at the net cost of the same to plaintiff in Council Bluffs; denies that the prices charged are the net cost prices; denies that the articles set out in the exhibit were furnished under the terms of the contract; denies that the account attached to the petition is correct; denies specifically that he ever received six items of the account, and denies that he is indebted to the plaintiff in the sum of \$1,190.23, but does not deny that he is indebted in some sum. If it should appear that the six items of the account specified were not received, and that the balance of the items of the account, or some of them, were not sold at their net cost to plaintiff at Council Bluffs, this would show that the goods were not furnished under the terms of the contract, nor at their net cost, and that the account is not correct, and the defendant does not owe the plaintiff \$1,190.23. In other words, if plaintiff should fail to prove that the goods were sold at their net cost, and that the specified items were received, there would be a failure to establish every fact which the answer denies. We cannot, therefore, fairly regard the answer as putting in issue more than these two facts. The plaintiff testifies that the goods were sold at the net price to him in Council Bluffs. Under the issues, the plaintiff should have had a verdict for all the items of account except those specifically denied. The court did not err in setting aside the verdict.

II. The defendant assigns as error and discusses certain rulings upon evidence made during the trial. As the verdict was practically in favor of defendant, these rulings worked him no prejudice. The only question properly before us is the ruling of the court upon the motion to set aside the verdict.

AFFIRMED.

BISSELL V. LEWIS ET AL.

1. **Payment:** NOTE: WHETHER PAYMENT OR PURCHASE. Where a party, in pursuance of a contract for the purchase of mortgaged property, sent the amount of certain overdue coupons to the trustee holding the mortgage, with a proposition to pay such coupons on condition the trustee would not insist on a forfeiture on account of the default, and the coupons were canceled and returned to him, it was held that the transaction constituted a payment and not a purchase, and extinguished the indebtedness of the mortgagor on the coupons, although the contract to purchase the property was afterward abandoned.
2. **Mechanic's Lien:** TAKING OF COLLATERAL SECURITY: WHAT IS NOT. The fact that a husband, who, as agent for his wife, contracts for materials to be used in the erection of a building on her land, also binds himself by such contract to pay therefor, will not constitute the taking of collateral security by the material man so as to defeat his right to a mechanic's lien.
3. ———: PRIORITY OF LIENS. As against those at the time holding junior liens, the amount of an existing mechanic's lien cannot be increased by an agreement of the owner to pay ten per cent interest and attorney's fees.
4. ———: VALIDITY OF: DESCRIPTION OF PROPERTY. The fact that the description in a statement for a mechanic's lien includes other property in addition to that owned by the person against whom the lien is claimed will not invalidate the lien.
5. ———: ———: TAKING OF COLLATERAL SECURITY. The taking of collateral security, after the completion of the work or the furnishing of the materials for which a lien is claimed, will not invalidate the lien though the building is not at the time completed.
6. ———: ———: FILING OF STATEMENT. As against the holders of other existing liens, it is not essential to the validity of a mechanic's lien that a statement and claim therefor should be filed with the clerk.

Appeal from Polk Circuit Court.

FRIDAY, JUNE 10.

ACTION to foreclose a mortgage, executed by Helen A. Lewis and Chas. G. Lewis, her husband. N. E. Walsh and John M. Day were made defendants. Other parties intervened, claiming they were entitled to mechanic's liens on the mortgaged premises superior to the lien of the mortgage.

56	231
91	707
85	231
96	856
97	84
98	475
99	239
56	231
105	6

Bissell v. Lewis.

The court entered a decree foreclosing the mortgage, and establishing the several mechanic's liens, which were decreed to be superior to the lien of the mortgage, and also that the defendant Day was entitled to priority over the mortgage for certain interest coupons he claimed to belong to him. The plaintiff appeals.

Wright, Gatch & Wright, for appellant.

Barcroft & McCaughan, Detrick & Snell, Phillips & Conrad, Smith & Morris, L. W. Goode, Smith & Baylies, and J. H. Stevenson, for John M. Day and Intervenor.

No appearance for H. A. and C. G. Lewis.

SEEVERS, J.—On the 25th day of July, 1877, the defendants Helen A. and C. G. Lewis executed eleven bonds, with coupons attached for the payment of the interest semi-annually, said bonds and coupons being payable to Geo. P. Bissell, or bearer, at the banking house of Geo. P. Bissell & Co., Hartford, Connecticut. Said bonds were payable ten years after date, and to secure the same the said Lewises executed a mortgage on certain real estate to "Geo. P. Bissell, trustee for the holders of certain bonds." No question is made on this appeal as to the correctness of the decree of the Circuit Court foreclosing the mortgage, or as to the amount found due thereon. Nor is it questioned that the intervenors are entitled to priority to the mortgage, if they are entitled to liens at all, as the same were adjusted in the decree of the Circuit Court, except as to the amount found due them. So far as is necessary the rights and liens of the parties will be separately considered.

I. *As to the coupon claim of John M. Day.*

On the 25th day of January, 1878, there became due certain of the interest coupons secured by the mortgage. The mortgagors failed to pay the same, and Day claims he became the owner thereof, and as they were the first due that he is entitled to a lien on the

1. PAYMENT;
note: whether
payment
or purchase.

mortgaged property to the amount of such coupons prior to that of the plaintiff, to whose rights he should be subrogated to the extent of his lien, as he claims.

The plaintiff claims Day paid such coupons, in pursuance to a contract entered into with the Lewises, and that the indebtedness evidenced by said coupons was extinguished.

On the 25th day of February, 1878, Day entered into a contract whereby he agreed to purchase of the Lewises, upon certain conditions, the mortgaged premises, and thereby Day agreed to pay the interest coupons then overdue within three days, upon being made secure in so doing by the Lewises. Because of the non-payment of said coupons the whole mortgage became due, at the option of the mortgagee; therefore Day stipulated in the contract with Lewises the latter should protect him as to this, and his purchase was made on condition he should have the same time to pay the mortgage the Lewises would have had if default had not been made in the payment of the interest.

Without insisting on being secured as above stated, Day, on the next day after the contract with Lewises, remitted to the plaintiff the interest aforesaid, and wrote him: "I have purchased the property with the agreement with Lewis, to be ratified by you, that there is to be no forfeiture upon the time originally given for the payment of the loan. If in this matter I cannot have the same time that the Lewises were entitled to before defaulting on their interest, so report and return the draft."

On March 1st, the plaintiff acknowledged the receipt of the draft to pay the interest coupons, and in reference thereto said: "Which we will send to you upon payment of \$3.63, interest on interest due us. If the property passes into your hands we understand that you assume the loan without any change in the time, etc., and that we hold you and also Lewises on the bond."

To this Day replied, March 9th, 1878: "Of course I am willing to pay \$3.63. I do not assume payment of the loan

made to Lewises from you, though I of course expect to pay the same." On March 19th the coupons were sent to Day.

Without doubt Day intended to pay the coupons when he wrote the first letter to the plaintiff, upon the conditions therein stated, which were that there should be no forfeiture, and he should have the same time to pay as if no default had been made in the payment of the interest. This offer had not been withdrawn when the coupons were sent Day, on the 19th day of March. This amounted to an acceptance by the plaintiff of the conditions attached to the offer to pay. For if the plaintiff kept the money he could only do so upon the terms proposed by Day. Whether the \$3.63 interest was paid we do not know, but clearly the plaintiff accepted the promise of Day to pay the same, or at least waived the payment of that amount before sending the coupons. The plaintiff without doubt regarded the transaction between him and Day as a payment, and not a sale of the coupons. It is said it could only be regarded as a payment on condition the bondholders agreed to waive their rights resulting from the nonpayment of interest, and this they did not do. But Day did not stipulate the bondholders should so agree; all he asked was that the plaintiff should do so; this the latter clearly did when he canceled and sent the coupons to Day. The latter got all he bargained for, because the forfeiture was not insisted upon, nor has it been at any time claimed the plaintiff or bondholders elected to consider the whole indebtedness due, because of the failure to pay said interest, or on the ground the forfeiture had not been waived. If Day had insisted the consent of the bondholders should be obtained, it might have been done. Having got all he asked, Day should not complain. We shall not stop to consider whether the plaintiff had the power to bind the bondholders or not. Day evidently believed he had, or if not so he was content to rely on his agreement to this effect, and the bondholders have never repudiated it. We think the court erred, in holding the coupons aforesaid had not

Bissell v. Lewis.

been paid, and making the same a lien on the mortgaged premises.

II. *The Claim of John M. Day as assignee of the lien of H. F. Getchell & Sons.*

In his contract with the Lewises Day agreed "to take up mechanic's liens to the amount of \$5,000," and it is objected by the plaintiff: First. That Day paid off this lien in pursuance of such contract. Second. That Getchell did not have a lien, and, Third. Conceding he had, the court erred in allowing ten per cent interest on the amount due.

As to the first point, we have examined the record with care and feel well satisfied the fair preponderance of the evidence is that Day did not pay off or "take up" in pursuance of the contract aforesaid, the Getchell lien, but that he purchased it, and instead of being extinguished it was assigned by Getchell to Day.

The point made and insisted on under the second objection is that during the progress of the building for the erection of which the materials were furnished Getchell took collateral security for the performance of the contract, and therefore is not entitled to a lien. Miller's Code, § 2129.

2. MECHANICS
lien: taking
of collateral
security:
what is not.

The real estate upon which the building was to be erected belonged to Mrs. Lewis, and the contract with Getchell was made by her husband, C. G. Lewis. The latter testified he "was the general agent for Mrs. Lewis for all matters connected with that building." There is nothing contradictory to this evidence, but much to strengthen and confirm it. Such agency must, therefore, be regarded as established, and herein lies the distinction between this case and *Miller v. Hollingsworth*, 33 Iowa, 224, and *Price & Hornby v. Seydel et al.*, 46 Id., 696.

That C. G. Lewis as such agent made a contract with Getchell for and on behalf of Mrs. Lewis, entitling the former to a lien, we do not understand to be disputed, unless it be true that collateral security was taken, which had the effect

Bissell v. Lewis.

to cut off the lien. At the time the contract was made Lewis became personally responsible for its performance, and before its completion he in connection with Mrs. Lewis executed their joint note or notes for at least a portion of the amount due thereon. As C. G. Lewis was personally bound by the contract, and the notes being given in pursuance thereof, the lien was in no manner affected thereby. *Bonsall v. Taylor*, 5 Iowa, 546; *Logan & Cooks v. Attix*, 7 Id., 77. Nor can such notes be regarded as collateral security for the performance of the contract. *Kidd v. Wilson*, 23 Iowa, 464; *Burdeck v. Moon*, 24 Id., 418.

But it is insisted that conceding C. G. Lewis to be the agent of Mrs. Lewis, such agency did not authorize him to enter into a joint contract binding Mrs. Lewis and himself, and that as this was done it amounted to taking collateral security. At least this is the logical result of the argument of counsel for appellant. We think that C. G. Lewis, as agent for his wife, had the power to make such contract as he deemed best for her interest, and that he could well make a joint contract binding on her and himself. In so doing the transaction amounted to this: Two persons contract for the erection of a building on the land of one of them; and because only one owns an interest in the land it cannot be said collateral security was taken on such contract and the mechanic thereby deprived of his lien.

The facts bearing upon the third objection are: That when the contract was made there was no agreement as to the rate or payment of interest; notes, however, were given as has been stated, and thereon interest at the rate of ten per cent was stipulated for and agreed to be paid.

The contract was made about the 4th day of May, 1877, and the delivery of the materials commenced on the 8th day of May, and the same was completed January 12, 1878. The plaintiff's mortgage was executed in July, 1877, and the notes executed in September, 1877.

The plaintiff insists that on May 8th, 1877, Getchell had a statutory lien on the premises which could not be enlarged to his prejudice after he as a junior incumbrancer obtained his mortgage. On the other hand it is insisted by the appellee, Day, that the right to the lien at the time aforesaid was contingent, depending on the volition of Getchell. One might be claimed, but the right thereto was not fixed and absolute at the time the mortgage was executed. The plaintiff, under the law, was bound to know at the time he took his mortgage that Getchell was entitled to a lien. This being so, it follows that he was also bound to know the extent of such right, and that his mortgage was subject thereto. When Getchell availed himself of his statutory right, it related back to a period prior to the mortgage. It is, therefore, immaterial as he has so done, whether it was contingent or fixed and absolute. The effect upon the rights of the plaintiff is precisely the same in both cases.

If Getchell had a prior mortgage instead of a statutory lien it would not, we think, be claimed that the amount of such mortgage could be increased to the prejudice of a subsequent incumbrancer. We are unable to see any distinction in principle between the two, and think the court erred in allowing interest on the Getchell lien at the rate of ten per cent.

The notes aforesaid contained a provision for the payment of attorney fees, and, as we understand, the Circuit Court provided in the decree that the amount allowed therefor should be a prior lien on the premises to the mortgage. This, we think, was erroneous, for the reasons above stated as to the interest allowed in the decree.

III. *The Claim of John M. Day, assignee of the lien of Geo. C. Baker & Co.*

Counsel for appellant in their argument say: "Many if not all the points made against the Getchell lien are applicable here." We need, therefore, only refer to such as are additional to those heretofore considered, except to say the facts as to the attorneys' fees being the same, the same result must

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follow. The difference as to the interest is that the contract with Baker & Co. was not made until after the mortgage was executed, and no materials were furnished thereunder until September, 1877.

The lien of Baker & Co. has priority over the mortgage, which was executed and recorded first in point of time, because the mortgage when executed was on real estate on which there was a partially erected building; and that it was to be completed, and there might be mechanic's liens thereon, was contemplated at the time the mortgage was executed. This the plaintiff was bound to know; *Neilson v. Iowa Eastern R. Co.*, 44 Iowa, 71. Baker & Co. also were bound to know when the contract was made with the Lewises, and they commenced furnishing materials thereunder, that said mortgage had been executed, and that their lien was prior thereto. So knowing, the contract was made without any stipulation or agreement that interest at the rate of ten per cent on the amount due was to be paid. This being so, we do not think Baker & Co. and the Lewises should be permitted thereafter to stipulate that interest at the rate of ten per cent should be paid, and the same become a lien on the premises superior to the mortgage.

It is objected that there is no evidence showing the materials furnished by Baker & Co. were used in the construction of the building. We, however, conclude otherwise, after a careful consideration of the evidence. We deem it unnecessary to set out or further refer thereto.

It is said the building was erected on the "west 70 feet of the north 110 feet of lots 11 and 12," and that the lien was claimed on the "north 110 feet of lots 11 and 12," and "that this is a misdescription, and therefore fatal to the lien." No authority is cited in support of this position, and we do not believe it is well taken. The lien was claimed on all the land owned by Mrs. Lewis, and more. The greater includes the less.

The building was not completed until January 18, 1878,

4. —: valid-
ity of: de-
scription of
property.

 Blissell v. Lewis.

and the Lewises executed their note to Baker & Co. for the amount due December the 7th, 1877. There is ^{taking collateral} no sufficient evidence to warrant the conclusion that C. G. Lewis bound himself personally at the time the contract was made, and therefore it is urged the taking a note binding C. G. Lewis personally to pay the amount due amounted to taking security therefor, and, therefore, Baker & Co. are not entitled to a lien.

The note was taken on settlement of the account, and the evidence warranted the conclusion that Baker & Co. had at that time completed the delivery of the materials contracted for, and for which the lien was claimed.

The statute provides that no person is entitled to a mechanic's lien who " * * * during the progress of the work, erection, building, or other improvement shall take any collateral security on such contract. But after the completion of such work, and where the contractor or other person shall have become entitled to claim or have a lien, the taking collateral or other security shall not affect the right to such mechanic's lien," unless it has been so agreed. Miller's Code, § 2129.

At the time Baker & Co. took the note they were entitled to a lien. They had at that time fully "completed the work" they had contracted to do, and we think the meaning of the statute is that they might then take security for the amount due without losing their lien. The money was their due, and their right to at once file and enforce their lien was perfect. No sufficient reason has been urged why they could not obtain payment or security without waiting until the building was completed, or avail themselves of their right to immediately enforce their lien.

The object of the statute doubtless is to prevent any one from obtaining a lien who takes security for the amount due or to become due at any time before he completes his contract, be it for work or materials.

 Bissell v. Lewis.

 IV. *The lien of H. R. Heath.*

The Circuit Court allowed ten per cent interest on the amount due. As the facts are the same as above stated in *a. —; —*: relation to Baker & Co. it follows this action of ^{filing of state-}_{ment.} the court was erroneous. Counsel for the appellant insist the lien was claimed on a "contract with C. G. Lewis," and as he was not the owner Heath is not entitled to a lien. The abstract states the lien was claimed of "C. G. and Helen A. Lewis" and that the material was furnished for the building under a contract with "C. G. Lewis, the owner thereof." The intervening petition of Heath alleges the contract was made with "C. G. Lewis and Helen A. Lewis." They were both present when the settlement was made and C. G. Lewis was the agent of Mrs. Lewis and acting as such at the time such contract was made. In the lien statement filed with the clerk a lien was claimed against both H. A. and C. G. Lewis. The former being the owner the lien was, therefore, claimed against her. The statement in the lien statement that C. G. Lewis owned the building should not, we think, deprive Heath of a lien. No one could have been misled thereby. But if it be conceded the lien statement was defective and insufficient is it essential to the establishment of the lien in question, against a junior incumbrancer, any lien statement should be filed in the clerk's office. If none was required an insufficient one cannot have the effect to deprive Heath of his lien. *Kidd v. Wilson*, before cited; *Evans v. Tripp*, 35 Iowa, 371; *Neilson et al. v. Iowa Eastern R. Co.*, 51 Id., 184.

The statute provides: "But a failure or omission to file the same (the lien statement) within the periods last aforesaid shall not defeat the lien except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for a lien was filed." Miller's Code, § 2133; also 3d Sub-division of § 9, page 577. It is quite clear it is not essential to the establishment of the lien under considera-

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tion that any lien statement should have been filed in the clerk's office, and the plaintiff was in no manner prejudiced by the insufficient one filed. The mortgage provides that in default of the mortgagors paying the taxes on the mortgaged property the plaintiff may pay the same and tack the amount paid to his mortgage. The mortgagors failed to pay the taxes and the plaintiff did so, after several lien statements had been filed, and as we understand it is insisted this gives the plaintiff priority over the mechanic's liens, or, if not so, then to the extent of the taxes paid, because as to said amount the plaintiff is "an incumbrancer in good faith without notice." In this view we do not concur. The plaintiff was bound to take notice of these liens whether lien statements had been filed or not at the time he paid the taxes, and, therefore, he is not an incumbrancer in good faith without notice.

V. *The liens of Comparet & Stark, Martin Tuttle, Entwistle & O'Dea, H. C. Hensen, Bolton Bros., Moore & Shaw, Samuel Green, and N. E. Walsh.*

It follows from what has been said the court erred in allowing ten per cent interest or attorney's fees to Comparet & Stark.

We have examined the objections made to the claims of the above named parties and believe they come within the rules above stated. Except as otherwise herein indicated, the decree of the Circuit Court is affirmed. The cause will be remanded to the Circuit Court with directions to enter a decree in accordance with this opinion, unless the parties elect to take a decree in this court, in which case one will be entered here. The plaintiff will recover his costs against all parties as to whom the decree below has been modified, and the other parties will recover their costs against the plaintiff.

MODIFIED AND AFFIRMED.

Goodale v. Hoy.

GOODALE V. HOY.

1. **Contract: BREACH OF.** Where a contract for the sale of a stock of agricultural machinery provided for part payment from the proceeds of sales thereof by the purchaser, it was held that the removal of the machinery by him out of the State did not constitute a breach of the contract which would convert the claim of the seller into a money demand against him, the contract containing no covenant against removal.

Appeal from Cass Circuit Court.

FRIDAY, JUNE 10.

On the nineteenth day of March, 1880, the plaintiff filed a petition, as follows:

"1st. That on and prior to the 18th day of March, 1879, he was engaged in selling agricultural implements at Atlantic, Cass county, Iowa, and that said business was restricted to said Cass county and the south half of Audubon county.

"2d. That on said 18th day of March, 1879, he entered into a written contract with said defendant to sell said business, with stock on hand, and that plaintiff did then and there deliver to defendant the said stock, consisting of sulky plows, corn plows, harrows, plow attachments, Valley City cultivators, rolling cutters, etc., and that said stock amounted in the aggregate to the sum of twenty-eight hundred and thirty-five dollars; that defendant paid on said contract the sum of fifteen hundred dollars, and agreed to pay the balance, to-wit: thirteen hundred and thirty-five dollars, in promissory notes as fast as sales should be made of said stock, said contract being in words and figures as follows, to-wit:

"Articles of agreement made this 18th day of March, A.D. 1879, by and between Robert Hoy and A. Goodale, of Atlantic, Iowa, Witnesseth: That said Robert Hoy has this day bought of A. Goodale the plow attachments, corn plows, har-

Goodale v. Hoy.

rows, rolling cutters and sulky plows, as per inventory this day made, at 25 per cent off from list prices—

Star sulky plows.....	\$55.00
Corn plow attachments.....	15.00
Harrows.....	15.00
Valley City cultivators.....	25.00
Rolling cutters.....	5.00
Steel beam walking plows.....	20.00

"The said Robert Hoy has paid fifteen hundred dollars in hand, and thirteen hundred and thirty-five dollars is to be paid as fast as sales are made in notes, as follows: The said Robert Hoy to take fifteen dollars and A. Goodale thirteen dollars and thirty-five cents.

ROBERT HOY.'

"3d. That defendant, with full knowledge of said restriction, took possession of said stock and continued said business at said Atlantic, until the removal of said stock as hereinafter stated.

"4th. That on or about the — day of — the said defendant removed all of said stock from said county of Cass to the State of Nebraska, without the knowledge or consent of plaintiff.

"5th. That said contract was entered into with the full understanding between the parties thereto that said business should be continued and carried on at Atlantic, and that by reason of said removal of stock there has been a breach of said contract, and that by reason of the removal of said stock from the State the said contract has become fully determined and the claim of the plaintiff thereon against defendant has become a money demand, and is now due and payable, and that there is now due on said contract the sum of thirteen hundred and thirty-five dollars."

The defendant filed a motion to strike from the petition the third, fourth and fifth paragraphs, as irrelevant, immaterial and incompetent allegations. The defendant also filed a demurrer to the petition. The court sustained both the motion

Goodale v. Hoy.

and the demurrer, to which ruling the plaintiff excepted. Thereupon the plaintiff filed an amendment to his petition as follows:

"1st. That a reasonable time has elapsed since the making of said contract to enable the defendant to sell the property named therein, and that said defendant has failed to account to plaintiff for the same or any part thereof and has failed and refused to deliver notes or any part of the same to plaintiff, as required by said contract.

"2d. That by removing said property out of the State the defendant has put it out of his power to comply with the terms of said contract, and for that reason the same has become fully determined, and a money demand, due and payable at Cass county, Iowa.

"3d. That the removal of said stock out of the State without the knowledge or consent of plaintiff was a conversion of the same by said defendant, and he is liable for the full value thereof."

The defendant filed a motion to strike out of the amendment the second and third paragraphs, and also a demurrer to the petition and amendments. The court sustained the motion and the demurrer. The plaintiff refused to plead further, and elected to stand upon his petition and amendments, and the court dismissed his cause without prejudice to a further action upon the contract for any other cause different from that embraced in his petition and the amendments thereto. The plaintiff appeals.

Chapman & Chapman, for the appellant.

Phelps & De Lano, for the appellee.

DAY, J.—I. The motion and demurrer, we think, were properly sustained. The written contract which furnishes the plaintiff's action, contains no stipulation against the removal of the property in question from the State. It cannot

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be maintained that such a removal converts the plaintiff's claim into a money demand, and gives him at once a right of action for the unpaid price. Nor can it be admitted that the mere failure for a year to make sale of the property furnishes the plaintiff a right of action. It is true it is the duty of the defendant, under the contract, to use reasonable diligence to effect sales and procure notes to apply upon the unpaid price. It is possible that a failure to exercise reasonable diligence to make sales would render the defendant liable. But no such failure is alleged.

II. It is claimed that the court erred in rendering judgment against the plaintiff in the manner set out. The form of judgment is not prejudicial to plaintiff. When a state of facts different from those set out in the petition arises, he may maintain an action thereon.

AFFIRMED.

56	245
86	299
56	245
107	20

VAN WINKLE V. THE IOWA IRON AND STEEL FENCE CO. ET AL.

- 1. Practice in the Supreme Court: CORRECTNESS OF ABSTRACT.**
An appellee can only question the correctness of the appellant's abstract by filing an amended abstract.
- 2. Equitable Assignment: GARNISHMENT.** The holders of certain notes and accounts which had been assigned them to be collected, and the proceeds applied on certain specified indebtedness of the assignor, were held not to be subject to garnishment by other creditors of the assignor.

Appeal from Cedar Rapids Superior Court.

SATURDAY, JUNE 11.

On the 2d day of May, 1880, the plaintiff recovered judgment against the Iowa Iron and Steel Fence Company in the sum of \$183.77. On the 8th day of May, Gilmore & Clark were served with notice of garnishment, and were cited to ap-

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pear on the second day of the following June Term. A commissioner was appointed by the court to take the answers of the garnishees. On the 6th day of July, 1880, the commissioner filed in court the answers of the garnishees. The plaintiff thereupon filed a motion for judgment on the answers of the garnishees. The hearing on said motion was continued from time to time until the 23d day of October, 1880, when the court entered a judgment for plaintiff for \$22.83, and a provisional judgment for \$178.47, unless the garnishees elect to turn over the assets in their hands, sufficient to satisfy the judgment. The garnishees appeal.

Gilmore & Clark, for appellants.

Rickel, West & Eastman, for appellee.

DAY, J.—I. The appellee in argument urges that the transcript of the record shows that no exceptions were taken to the action of the court in sustaining appellee's motion for judgment upon the answers of garnishees, at the time such action was had, and that no exception was taken until the bill of exceptions was filed, more than three days after the judgment was entered. The abstract sets out what purports to be a correct copy of the judgment entry. In this entry, immediately after the rendition of judgment, is the following statement: "to which garnishee defendants except." This clearly imports that the exception was taken when the judgment was rendered. The plaintiff cannot impeach the abstract by a mere statement in argument. If the abstract was deemed incorrect, an amended abstract should have been filed by appellee.

II. It is insisted that the abstract does not purport to contain all the evidence. The abstract states: "On the 6th day of July, 1880, the said commissioner, N. L. Ward, filed in this case the answer of garnishees, as follows, omitting formal parts." Then follows question and answer, covering, with the exhibit attached, thirteen pages of the printed abstract.

Van Winkle v. The Iowa Iron and Steel Fence Co.

The abstract states that the commissioner "filed the answer of garnishees, as follows." If the answer contained other matter this statement is misleading and untrue. The only reasonable inference from the abstract is that the answer set out contains the entire answer of the garnishee. No issue was taken upon the answer of the garnishee. No other evidence was competent or admissible. The abstract states that the plaintiff filed a motion for judgment upon the answers of the garnishees. We think it does fairly appear that the abstract contains all the evidence upon which the Court acted.

III. The garnishees in their answer deny that they have, or had at the time of their garnishment, any money, property, 2. EQUITABLE assignment: garnishment. rights or credits in their possession, or under their control, belonging to the principal defendant. They set forth in substance that some time in the spring of 1880 the Iowa Iron and Steel Fence Company delivered and assigned to them a large number of notes and accounts, of the nominal value of about \$3,000, in trust for certain creditors named, ten or twelve in number, with instructions to collect the notes and apply the money *pro rata*, after deducting a reasonable amount as compensation for collecting; that the nominal amount of the debts was about half the nominal amount of the notes, but that the notes and accounts, when collected as closely as they can be, will pay only a small percentage on the debts; that immediately after the notes and accounts were assigned, the garnishees notified the creditors in whose interest the assignment was made, and no one has dissented or objected; but all have treated it as satisfactory; that garnishees have in their hands a balance collected on said notes and accounts of \$98.28, and the principal defendant is owing them, on transactions not growing out of the assignment, \$75.45.

Upon this answer we are clearly of opinion that the court erred in rendering judgment against the garnishees. The fund in their hands was held in trust for creditors named. The assignment was not coupled with any condition, and the

 White v. Day, Egbert & Fidler.

assent of the creditors interested is presumed. Besides, they were notified of the arrangement, and treated it as satisfactory. These notes were devoted to the payment of certain of the creditors of the principal defendant. There was nothing illegal or improper in the transaction. It was not competent for the court to defeat the arrangement. Indeed, we understand the appellee to rely solely upon the point that the abstract does not purport to contain all the testimony. In the view which we have taken of the case, the motion of the appellee to strike certain affidavits from the transcript, which was submitted with the case, becomes immaterial, and need not be determined.

REVERSED.

56 248
110 584

WHITE V. DAY, EGBERT & FIDLER.

1. **Contract: FOR PUBLICATION OF BOOK: COPYRIGHT.** Where by the terms of a contract for the publication of a book the author was to procure a copyright, for the benefit of the publishers, it was held that he could not maintain an action against them for a failure to publish the book in accordance with the contract without showing that he had deposited in the mail, addressed to the Librarian of Congress, a printed copy of the title, such act being required by the copyright laws precedent to the publication of the book.

Appeal from Scott Circuit Court.

SATURDAY, JUNE 11.

ACTION for damages for breach of a contract. One C. A. White, assignor of the plaintiff, delivered to the defendant a manuscript entitled, "A Manual of Physical Geography and Institutions of the State of Illinois," and entered into a written agreement with them that they should publish the book in a suitable form for the use of the schools of Illinois, and pay the said C. A. White ten per cent on the amount of sales. C. A. White, upon his part, agreed to procure a copyright in

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his own name, which was to inure to the defendants. The petition sets out the contract and avers that the defendants have failed to publish the book; that damages have accrued by reason of the failure, to which the plaintiff has become entitled by assignment; but the petition does not aver that C. A. White has taken any steps to procure a copyright.

The defendants demurred to the petition, on the ground that it does not show a performance of the contract on the part of the plaintiff's assignor. The court sustained the demurrer, and the plaintiff standing by his petition judgment was rendered for the defendants. Plaintiff appeals.

Herschel & Preston, for appellant.

Cook & Richman, for appellee.

ADAMS, CH. J. The statute provides that "no person shall be entitled to a copyright unless he shall, before publication, deposit in the mail a printed copy of the title of the book * * * for which he desires a copyright, right, addressed to the Librarian of Congress." 16 U. S. Statutes at Large, 213. As a copyright was to be secured it certainly was not proper to publish the book in advance of the deposit in the mail of a printed copy of the title, addressed to the Librarian of Congress, for it appears that such publication would have defeated the right to a copyright.

The plaintiff claims, however, that before it was incumbent upon his assignor to make such deposit of a printed copy of the title, it was incumbent upon the defendants to supply him with the printed copy to be deposited. He claims that the printing of the title is a part of the printing which the defendants agreed to do in printing the book.

Doubtless when a book is printed the title printed in the book is a part of the book. But a title may be printed for some purpose other than as a part of the book, and such is the case contemplated by the statute. We find nothing in

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the contract from which we can say that the defendants were to print more than the book, and hence it appears to us that they were not bound to furnish the printed title for deposit.

The plaintiff insists, however, that the failure to make the required deposit of the printed title can be taken advantage of only by answer. But we think otherwise. The petition sets out a contract under which it was incumbent upon the plaintiff's assignor to do something before it was incumbent upon, or even proper for, the defendants to perform on their part. This appeared upon the face of the petition. In the absence of any averment that the plaintiff's assignor had performed what was necessary to be performed before the defendants could perform, it does not appear that the defendants were in fault.

The plaintiff further insists that the demurrer does not reach the precise point. The objection to the petition raised by the demurrer is that it does not show a performance of the contract on the part of the plaintiff's assignor. Now it is said that the contract on the part of the plaintiff's assignor was to procure a copyright, and that that could not be procured in advance of publication.

But in our opinion the contract to procure the copyright was a contract to take the different steps necessary for that purpose. While, therefore, it was not necessary to aver a complete performance on the part of the plaintiff's assignor, it was necessary to aver the performance of so much as was a condition precedent to the right to demand performance on the part of the defendants. The demurrer might, we think, have been more specific. But, as the petition is manifestly defective, and the demurrer was evidently understood and treated as raising the objection, we cannot sustain the appellant's position without taking a more technical view of the case than we feel justified in doing.

AFFIRMED.

TURNER V. POTTER.

1. **Estate: LIABILITY ON PROMISSORY NOTE.** Evidence considered and held insufficient to establish the liability of an estate upon certain promissory notes.

Appeal from Des Moines Circuit Court.

SATURDAY, JUNE 11.

THIS is an action upon six promissory notes. The following is a copy of one, the others being of about the same tenor and effect.

"\$500.00

BURLINGTON, Oct. 20, 1873.

"Three months after date we promise to pay Turner & Co. five hundred dollars, with interest at ten per cent.

"BURLINGTON & SOUTHWESTERN RAILWAY Co.

V. K. MOORE, A. TR."

It is averred in the petition and amendments thereto that the notes in suit are the individual notes of E. B. Ward, deceased, of whose estate the defendant Potter is executor. The grounds of such claim, briefly stated, are as follows: Prior to 1873 the Burlington Southwestern Railway Company had constructed its road from Burlington to Unionville, Missouri. Said company was insolvent. In September, 1873, the decedent, E. B. Ward, claiming to be lessee of said railway, took possession thereof, and thereafter operated and controlled it. Said company was indebted to plaintiff in a large sum of money upon note and account. After Ward took possession of the road plaintiff commenced an action against the railway company in Missouri, and seized a certain locomotive upon a writ of attachment as the property of the company; that said Ward by his agents claimed that he had leased said railway, but proposed if plaintiff would desist from attempting to subject said property so seized, and would extend the

Turner v. Potter.

time of payment of a portion of said debt, that he would then pay a portion thereof, and would assume and pay the residue; that plaintiff acceded to said proposition, and that thereupon the said Ward, by his agent Moore, executed the notes in suit, which were delivered as and for the notes of Ward, in the name and style used by him in transacting said business; that said Ward after taking possession of the road claimed to be lessee thereof, and held out to persons dealing with him and to the public that he was such lessee, and thereby caused plaintiff to believe that the notes in suit were signed in his name, used in his said business, and to bind him as lessee.

Issue was taken upon the petition and amendments thereto. There was a trial by jury. After both parties had introduced their evidence the court upon the motion of the defendant instructed the jury to return a verdict for the defendant. The plaintiff excepted and moved for a new trial. The motion was overruled, and judgment was entered on the verdict. Plaintiff appeals.

P. Henry Smyth & Son, for appellants.

H. H. Trimble and *E. S. Huston*, for appellee.

ROTHROCK J.—I. The contract under which the decedent Ward was in possession of the railroad is fully set forth in the case of the *United States Rolling Stock Company v. Potter*, 48 Iowa, 56, where it was held that said contract was not a lease, and that Ward was not individually liable upon an undertaking entered into by the company prior to his contract therewith. It follows that the plaintiff herein had no right of action against Ward for his claim against the company. All of the indebtedness originated before the contract was made. It is insisted, however, that the estate of Ward is estopped by the acts and declarations of the decedent from disputing liability upon the notes in suit. There certainly can be no estoppel arising from the form of the notes, for they do not purport to be the notes of Ward, but the obligations of

the railroad company. Neither can it be claimed that any estoppel arises by reason of the settlement and compromise of the attachment suit which was pending in the State of Missouri. That action was not brought upon the indebtedness upon which this suit is founded. It was upon other obligations of the railroad company. By the compromise the plaintiff was paid in full all he claimed in the suit, and the indebtedness now sought to be recovered, which was then in the form of an account, was by the compromise evidenced by the notes now in suit. The plaintiff, therefore, surrendered no right as to this indebtedness, by the compromise. The railroad company was then and is now insolvent, and the compromise of the action which was pending in Missouri placed plaintiff in no worse position with reference to this claim than he was before.

II. The notes purport to be the notes of the railroad company, and the estate of Ward is not liable thereon unless it be shown that Ward adopted the name of the railroad company under which to transact this business, and intended by giving the notes in this form to be individually liable thereon. Upon this question the burden of proof was on the plaintiff. The question for our determination is, was there such an absence of evidence tending to establish this issue as to justify the court in directing a verdict for the defendant, under the rule in *Muldowney v. I. C. R. R. Co.*, 32 Iowa, 176, *Way v. The same*, 35 Id. 585, and other cases in this court.

We have carefully examined the testimony of the witnesses as contained in the abstracts of the respective parties, and more especially the testimony of the plaintiff himself, and, without setting out the evidence here, we deem it sufficient to say that there is nothing in the record tending to show that in the transaction of this business Ward used the name of the railroad company to bind himself individually, nor intended to do so, or that he authorized any agent to sign the name of the railroad company for any other purpose than to bind the company. We do not understand from the evidence of

Montelius v. Wood.

the plaintiff, as set out in the abstract and additional abstract, that any such representation was made to him. He was one of the station agents of the railroad company, and knew when he took the notes that they were executed in the name of the company.

We think the court did not err in directing a verdict for the defendant.

· AFFIRMED.

MONTELIUS V. WOOD.

1. **Promissory Note:** FAILURE OF CONSIDERATION: VENDOR AND VENDEE. A contract for the sale of land provided that in case of default in payment of any of the notes given for purchase money the vendor might declare a forfeiture and resume possession of the land, and that all payments theretofore made should be forfeited as liquidated damages for the breach of the contract; on the maturity of one of the notes a part payment was made by the vendee, and a new note for the remainder and accrued interest on the other notes was executed; for subsequent defaults the vendor declared the contract forfeited and resumed possession of the land: *Held*, that such forfeiture constituted a failure of consideration of the note executed in renewal.
2. **Verdict:** HELD EXCESSIVE. A verdict held excessive under the evidence and special findings.

Appeal from Taylor District Court.

SATURDAY, JUNE 11.

ACTION upon a promissory note. The defendant pleaded that the consideration for the note had failed, and set up a counter-claim for damages arising out of the levy of a writ of attachment sued out by the plaintiff in the action, and another cross claim for certain hay which it is alleged plaintiff purchased of the defendant.

There was a trial by jury, and verdict and judgment for the defendant for \$323. Plaintiff appeals.

Crum & Haddock, for appellant.

Whiffin & Brown, for appellee.

 Montellus v. Wood.

ROTHROCK, J.—I. The plaintiff sold the defendant a farm and took promissory notes for the purchase money. The contract of sale provided that “in case of the failure of the defendant to perform the contract, and make the payments agreed upon, the contract should at the option of the plaintiff be forfeited, and defendant should forfeit all payments made by him thereon, and such payments should be retained by the plaintiff” in liquidation of all damages by him sustained, with the right to the plaintiff to re-enter and take possession of the land.

The first note to mature was in the sum of \$500. Defendant paid \$397 thereon, and made default in the payment of the balance. The interest on another note was also due. Thereupon the note for \$500 was surrendered to the defendant and the note in suit was given for the balance and for the interest due on the other note. Afterwards the defendant being in default in his payments the plaintiff gave him notice to quit, and took possession of the land in March, 1878.

It is claimed by the plaintiff that the note in suit was a payment of the amount then due, and that because he extended time there was sufficient consideration therefor. There was undoubtedly a sufficient consideration when the note was given, for it was a mere renewal of another note. But it was no payment in the sense that the plaintiff can now enforce it in the face of his contract that if he should take possession the amount paid should be in full of damages. The note in suit was for purchase money, to all intents and purposes, the same as the one for which it was a renewal, and it was satisfied, or the consideration therefor failed, when the plaintiff elected to take possession of the land.

II. The defendant claimed of the plaintiff the sum of \$12.00 for hay, and \$245 actual damages, and \$255 for exemplary damages for wrongfully suing out the attachment. The jury found specially that the defendant was not indebted to the plaintiff on the note. The abstract shows the following interrogatory was pro-

1. PROMISSORY
NOTE: failure
of considera-
tion: vendor
and vendee.

2. VERDICT:
held excess-
ive.

Montellus v. Wood.

pounded to the jury: "State the amount allowed by you as damages for the wrongful suing out of the attachment, if anything you allow?" *Ans.* Damages, \$193." No other claims were made by the defendant. How the jury after allowing \$193 for the wrongful suing out of the attachment magnifies the general verdict to \$323 is more than we can understand. The utmost that could properly have been found under the pleadings and evidence was \$205. It will not do to say, as claimed by the defendants' counsel, that the excess was for exemplary damages. The special interrogatory and answer plainly show that \$193 was allowed for all damages on the attachment bond.

The plaintiff did not ask for judgment on the special verdict. He asked that the general verdict be set aside and a new trial granted, and also that the special verdict be set aside. We think he should not be concluded because he did not ask for judgment on the special verdict. The general verdict was unquestionably excessive, independently of the special verdict. The court should have required the defendant to remit all of the general verdict in excess \$205, and in the event of a refusal granted a new trial. Before any costs were made on this appeal the defendant served on the plaintiff a notice in writing to allow the judgment to be so modified, which offer was refused. It should have been accepted. A judgment will be entered in this court in favor of the defendant against the plaintiff for \$205 and costs, and \$193 thereof to be against the surety in the attachment bond. And as the plaintiff refused the written offer for judgment he will be required to pay the costs of this appeal.

MODIFIED AND AFFIRMED.

 Stephens v. Pence.

STEPHENS V. PENCE.

1. **Practice: EVIDENCE.** Where evidence offered is not objected to, the adverse party cannot insist in the Supreme Court, for the first time, that such evidence was not properly before the trial court.
2. **Mortgage: ON CHATTELS: DESCRIPTION.** A chattel mortgage on "goods, wares and merchandise," then in stock in a certain store-room and to be added to replenish such stock, was held to cover barrels of salt kept for sale as a part of the stock and stored in a shed used in connection with the store, and also barrels of kerosene oil which had been temporarily removed from the store.

Appeal from Linn District Court.

SATURDAY, JUNE 11.

ACTION to recover the possession of three barrels of kerosene oil, and sixty-eight barrels of salt, to which it was alleged in the petition the plaintiff was entitled under a chattel mortgage executed by Keyes & Parkhurst, and which the defendant had wrongfully taken into his possession. The defendant is a constable, and justified the taking under an execution against Keyes & Parkhurst. Trial to the court. Judgment for the plaintiff, and defendant appeals.

G. W. Wilson, for appellant.*Jas. D. Giffin*, for appellee.

SEEVERS J.—I. Conceding the evidence is all before us, which, however, is denied in an amended abstract, the errors will be briefly considered. The first is that the mortgage was not introduced in evidence, and, therefore, it is insisted the plaintiff failed to show he was entitled to the possession of the property in controversy. The abstract states: "Plaintiff's counsel offers in evidence the mortgage attached to plaintiff's petition." To this no objection was made. It is evident the mortgage was regarded by the court below as having been introduced as evidence, and

1. PRACTICE:
evidence.

56	257
88	733

56	257
83	509
56	257
94	568

56	257
98	20

Stephens v. Pence.

rightly so, because no objection was made when it was offered. The point now insisted on is without merit, and cannot be urged for the first time in this court.

II. It is assigned as error that the property in controversy was not included in or covered by the mortgage. The following is the description of the property contained in the mortgage. "Our entire stock of goods, wares and merchandise, consisting of groceries, queensware, confectioneries, feed, provisions and all articles of goods, wares and merchandise now in stock, and that may hereafter be added to said stock, to stock up and replenish the same, in the store-room now occupied by us as a grocery store, being No. 21, on lot 8, block 13, Marion, Iowa."

It is said neither kerosene or salt are groceries, queensware, confectioneries, feed, or provisions. Conceding this, kerosene and salt, clearly, we think, are included in the language "All other articles of goods, wares and merchandise now in stock, and that may hereafter be added to stock up and replenish the same," for, certainly, kerosene and salt are goods and merchandise.

The salt was in a shed on the premises used in connection with the store room, for the purpose of storing salt and other articles kept for sale, and the kerosene, when levied on, was on the pavement in front of the store, but there was evidence tending to show it had been rolled out of the store for some purpose which does not appear, in the morning of the day it was levied on by the defendant. The court, we think, under the evidence was justified in finding such removal was temporary, and that while it was on the pavement in front of the store room, and the salt in the shed, they were covered by the mortgage.

III. It is lastly insisted that after acquired property cannot be mortgaged. It has been held otherwise, and the rule on this subject in this State must be regarded as settled. *Scharfenburg v. Bishop*, 35 Iowa, 60.

AFFIRMED.

TEMPLIN V. ROTHWEILER ET AL.

1. **Practice: ACTION ON WRITTEN INSTRUMENT: DENIAL.** In an action on a written lease, which was set out in the petition, and the execution of which was not denied under oath, it was held erroneous to submit the question of its execution to the jury.
2. **Instruction: APPLICABILITY TO EVIDENCE.** An instruction held erroneous, as not warranted by the evidence.

Appeal from Johnson District Court.

SATURDAY, JUNE 11.

ACTION upon a lease, by the terms of which the plaintiff leased to the defendants for three years certain real estate, on which there was an orchard, shrubbery, etc. The defendants bound themselves to trim and prune at the proper time each year, and take proper care of the fruit trees, shrubbery, hedge etc. Also to gather apples and other fruits at the proper time, and deliver to the plaintiff two-thirds of the apples and one-half of the small fruits. The defendants further bound themselves to "put in in the fall of 1876 one-half acre of concord grapes on the premises, the place to be selected by defendants." Performance on his part by the plaintiff was alleged and that defendants had failed to perform on their part. The defendants denied the contract, and denied they had failed to perform the same. The defendants also pleaded the "contract was mutually abandoned, and defendants released from responsibility thereon. "That as to the failure to deliver fruit, and all other failures, plaintiff excused the same at the time the plaintiff and the defendants settled all other matters, before the commencement of this suit.

Trial by jury, verdict and judgment for the defendants and plaintiff appeals.

G. A. Ewing, for appellant.

No argument for appellees.

 Templin v. Rothweller.

SEEVERS, J.—I. The lease was in writing and its execution was not denied under oath. It was introduced in evidence without objection, and there was no evidence tending to show it had not been executed by the parties. The court instructed the jury that: "The plaintiff must satisfy you by a preponderance of evidence that the contract described and set out in the petition was executed, and unless you are so satisfied your verdict will be for defendants." As the contract was not denied under oath, and there was no evidence tending to show it had not been duly executed, its execution should have been regarded as admitted, and the jury so instructed. Instead of so doing, the question whether the contract had been executed was submitted to the jury. The action of the court in this respect was erroneous; whether it was prejudicial is not determined.

II. The plaintiff introduced evidence tending to show the defendants had in several respects failed to perform the contract on their part. The defendants gave evidence tending to show the contract was abandoned and the plaintiff took possession of the premises in the spring of 1877. The evidence also tended to show the defendants made a contract to purchase the plaintiff's share of the apples produced in the year 1876. This statement may not be entirely correct, but it will be so conceded for the purposes of the case.

The court instructed the jury if the "loss of the plaintiff has been fully settled and paid for, or that the performance of the contract was excused by the plaintiff, or by mutual consent abandoned by the parties, or that the plaintiff waived the performance of the contract, then your verdict will be for the defendants.

This instruction is erroneous in this, there was no evidence tending to show that damages caused by any of the alleged breaches was settled, or in any manner adjusted or the per-

Phillips v. Shearer.

formance thereof excused, unless it was in relation to the apples, and this we think was a debatable question.

Conceding there was evidence tending to show the contract was by mutual consent abandoned, this only applied to the future, and had no tendency to show the damages caused by past breaches had been settled, or that such breaches had been excused or released.

The question asked the witness Howard was, we think, improper, and therefore the objection thereto was properly sustained. No other alleged error than those considered will probably arise on the re-trial.

REVERSED.

PHILLIPS V. SHEARER.

1. **PRACTICE: OFFER TO CONFESS JUDGMENT: COSTS.** To entitle a defendant to costs by reason of an offer to confess judgment, under section 2399 of the Code, such offer must be confined to the matters in suit.

Appeal from the Delaware Circuit Court.

SATURDAY, JUNE 11.

ON the fifth day of October, 1880, the plaintiff commenced an action before A. Tuttle, J. P., claiming of defendant \$95.44 on account, for milk, corn, damages to stock, one-half interest in a calf, merchandise, etc., and notified defendant to appear before said justice at 10 o'clock A.M., October 12th. On the 9th day of October, the defendant served upon plaintiff a notice in writing as follows: "You are notified that on the 12th of October, A.D. 1880, at ten o'clock, in the forenoon of that day, I shall appear before A. Tuttle, J. P., within and for the county and State aforesaid, at his office in South Fork township in said county, and will then and there offer to confess judgment in your favor, on the cer-

Phillips v. Shearer.

tain claim or demand held by you against me for corn, etc., and for milk, due you up to date of October 12th, 1880, and all claims you have against me, for the sum of sixty dollars and costs in said action. You can attend at said time and place and accept said confession if you desire so to do." At the time prescribed in the notice the plaintiff appeared by counsel, and refused to accept the offer to confess judgment. Thereupon the cause was tried to a jury and a verdict was returned for the defendant. The plaintiff appealed. The cause was tried to a jury in the Circuit Court, and a verdict was returned for plaintiff for \$31.41. The defendant thereupon filed a motion to tax to the plaintiff all costs subsequent to October 12th, for the reason that the amount recovered was less than the amount for which the defendant offered to confess judgment. The court overruled the motion, and rendered judgment against the defendant for the \$31.41 and costs. The defendant appeals. The court certifies the question upon which it is desirable to have our opinion to be as follows: "Did the court err in overruling the motion of defendant, to tax all costs subsequent to date of October 12th, 1880, to plaintiff?"

Welch & Welch, for the appellant.

Herrick & Dowsee and *J. B. Powers*, for the appellee.

DAY, J.—The offer to confess was made under section 2899 of the Code. The offer is not confined to the claims made by the plaintiff, but includes the amounts due on the claims made, up to October 12th, 1880, the date of trial, and all other claims which the plaintiff has against the defendant. If the plaintiff had accepted the offer, it would have been in satisfaction not only of the claims sued upon, but of all other claims which the plaintiff may have held. The plaintiff recovered upon the claims only upon which he sued. The defendant had no right to embrace other claims in his offer to confess. The court did not err in overruling the defendant's motion.

AFFIRMED.

THE STATE V. PETERS.

1. **Criminal Law: INDICTMENT FOR RAPE: INCLUDED CRIMES.** An indictment for rape includes the crime of assault with intent to commit rape, and that of simple assault, and an instruction which precludes the jury from convicting of the latter crime under such an indictment is erroneous.

56	265
86	619
56	268
4100	80
56	263
118	500

Appeal from Linn District Court

SATURDAY, JUNE 11.

THE defendant was indicted for a rape on Louise Haberman. He was tried, convicted of an assault with intent to commit a rape, and sentenced to the penitentiary for two years and six months. He appeals.

Blake & Hormel, for the appellant.

Smith McPherson, Attorney General, for the State.

DAY J. The defendant, as a witness upon the trial, admitted that he had sexual intercourse with the prosecuting witness, at the time named in the indictment, but claimed that the intercourse was with her consent. In finding the defendant guilty of an assault with intent to commit a rape, the jury must have found that the evidence did not show that the intercourse was against the will of the prosecutrix. The court instructed the jury that, if the evidence failed to satisfy them that the defendant committed the crime of rape charged in the indictment, they might, if warranted, find him guilty of an assault with intent to commit a rape, and that the form of their verdict would be guilty of rape, guilty of an assault with intent to commit a rape, or not guilty. The jury were thus precluded from finding the defendant guilty of any lower grade of offense than an assault with intent to commit a rape. In *State v. Vinsant*, 49 Iowa, 241, it was held that, under an indictment for rape, a defendant may, if the evidence war-

 Harrier v. Fassett.

rants it, be convicted of a simple assault, and that an instruction by implication precluding the jury from convicting of an assault is erroneous. The peculiar circumstances disclosed by the testimony in this case raise a very grave doubt whether the defendant committed the offense of which he has been convicted, and we think he must have been prejudiced by the instructions which authorized a conviction for no less grade of offense than that of assault with intent to commit a rape. See *State v. Vinsant, supra*.

REVERSED.

 HARRIER V. FASSETT ET AL.

56	264
121	349

1. **Exemption: PROCEEDS OF EXEMPT PROPERTY.** The proceeds of personal property exempt from execution, voluntarily sold by the owner, are not exempt.

Appeal from the Superior Court of Cedar Rapids.

SATURDAY, JUNE 11.

THE plaintiff moved the court to render judgment against the garnishee, which was overruled, and judgment rendered for the defendants. The plaintiff appeals.

Frank G. Clarke, for appellant.

No appearance for appellees.

SEEVERS, J.—The amount in controversy being less than one hundred dollars, the trial judge has certified that it is desirable to have the opinion of the Supreme Court on the following question: "Where 'A' voluntarily sells a team of horses exempt from execution and recovers a judgment for the balance due on said sale against the vendee, 'B', is the judgment debtor 'B' liable as garnishee to a judgment creditor of 'A'?"

Harrier v. Fassett.

At common law all the personal property of a debtor is liable to be seized on execution and appropriated to the payments of his debts. It is provided by statute a debtor may hold exempt from execution "the horse or team, consisting of not more than two horses or mules or two yoke of cattle, and the wagon or vehicle with a proper harness or other tackle by use of which the debtor * * * habitually earns his living." Code, § 3072. It is the specific property mentioned in the statute which is thereby exempted from execution, and not the proceeds of such property if the same has been voluntarily sold by the debtor. We cannot by construction extend the statute to the property or the proceeds thereof not mentioned therein. If the legislative intent had been to exempt the proceeds of exempt property when the same had been voluntarily sold by the debtor it undoubtedly would have been so declared. The policy of the law seems to be to exempt the team so that therewith the debtor may earn his living.

It is provided in § 3244 of the Code that where a money judgment has been rendered for property exempt from execution which was wrongfully taken, the judgment or money shall also be exempt. It will therefrom appear that a statutory distinction has been drawn between the voluntary and involuntary sale of exempt property and the proceeds thereof. The views above expressed are sustained by *Friedlander v. Mahoney*, 31 Iowa, 311; *Knabb v. Drake*, 23 Penn. St., 489; *Wygant v. Smith*, 2 La., 185; *Carty v. Drew*, 46 Vermont, 346. The question certified must be answered in the affirmative, and the judgment below

REVERSED.

ROGERS V. GILLETT ET AL.

1. **Statute of Limitations:** ESTATE: DISTRIBUTION OF. Where by the terms of an agreement between the heirs of a decedent certain of the heirs were to receive an additional allowance upon final distribution of the estate, it was held that such distribution related to real as well as personal estate, and that a claim for such allowance set up in an action for the partition of the last remaining real estate of the decedent was not barred by the statute of limitations, although more than ten years had elapsed since the making of the agreement.
2. —: —. The claim for such additional allowance was not one that could be proved against the estate, and which would therefore be barred if not filed within a year from granting the administration.

Appeal from Des Moines Circuit Court.

SATURDAY, JUNE 11.

ACTION for the partition of two parcels of real estate, one containing forty and the other twenty acres, belonging to Comfort Gillett at his decease, in 1864. The said Comfort left surviving him seven daughters and two sons, all of whom, or their heirs, are parties to this action. The plaintiff claims to be entitled to the one-ninth part of said real estate. The petition states that one of the tracts was the homestead of said Comfort Gillett at the time of his death, and that his widow elected to hold and occupy said homestead for and during her life; that she did so, and died in 1870; that Delos A. Gillett has conveyed his interest in the real estate to Mary Gillett. This action was commenced in March, 1880, and the defendants Delos A. and W. H. Gillett alone answered the petition. They admitted the real estate was inherited from Comfort Gillett, and it was alleged he had executed a written instrument as his last will, which was filed for probate in the proper court; that by the terms of said will the said Delos and W. H. Gillett were to receive a larger portion of the estate than the other legatees, and that the latter executed a written agreement whereby it was provided if

said will was set aside and declared inoperative they would allow the said Delos and W. H. Gillett two hundred dollars more than their shares otherwise would be, the same to be deducted pro rata from the shares of heirs other than the answering defendants. The said will was set aside by the proper tribunal, and all the estate, real and personal, of said Comfort Gillett, except that sought to be partitioned, has been disposed of, and the partition sought in this action is the final distribution of the estate; that the real estate is of such a character that it cannot be divided, but will have to be sold. Whereupon the said defendants claim they are entitled to the amount due them under the written agreement, that the same be adjudged a lien on the real estate, and they also ask general relief.

A demurrer to the answer was sustained, and defendants electing to stand thereon a decree was entered and they appeal.

John C. Power, for appellants.

Hall & Huston, for appellee.

SEEVERS, J.—The plaintiff and the other daughters of Comfort Gillett executed, in 1866, the written agreement referred to in and made a part of the answer, and thereby it was provided in the event the instrument purporting to be the will of said Comfort was set aside: “We will allow proportionately out of the portion coming to us, the daughters of said Comfort, enough to make two hundred dollars to W. H. Gillett and D. A. Gillett, each. In other words said W. H. and D. A. Gillett shall receive on final distribution each two hundred dollars more than what his distributive share would otherwise be.”

One ground of the demurrer in substance was that the relief asked in the answer is barred by the general statute of limitations. By this we understand the claim to be the cause of action was barred in ten years after it accrued, and that on

1. STATUTE OF
Limitation: es-
tate: distri-
bution of.

Rogers v. Gillett.

the face of the pleadings it appeared such time had elapsed when the action was commenced. As to this we have to say:

I. The allowance was to be made at the time the final distribution was made. Until then the defendants were not entitled to anything under the agreement. It would seem to follow no right of action accrued until that time. It is alleged in the answer this proceeding is such final distribution, but this possibly may be a legal conclusion. Conceding this, there is no allegation in either the petition or answer that there ever has been such distribution unless this proceeding can be so regarded. Therefore it would seem to follow the demurrer on this ground was improperly sustained. It is said by counsel for the appellee that real estate is never distributed, but descends to the heirs, and that, therefore, it must have been contemplated the allowance was to be made out of, and when the final distribution of, the personal estate was made; that this cannot be now done because administration is barred in five years, and more than this time has elapsed since the death of Comfort Gillett.

Distribution has been defined to be the "division of an intestate's estate according to law." 1 Bouvier's Law Dictionary, 438. The estate of a deceased person may consist of both real and personal property, or it may include the former only, and there is no allegation in the pleadings that there was any personal property. We do not think the words final distribution should be construed in a strictly technical sense, but the intent was whenever final distribution of the estate was made the defendants should be entitled to the allowance. But it is urged the defendants could have applied for a partition of the real estate immediately after the agreement was executed, and have the allowance made them in that action if it can be done now, and, therefore, the bar of the statute is complete. Such evidently was not the intent of the parties at the time the agreement was made. But conceding the defendants could have brought an action for the partition of the real estate they did not obtain such right by virtue of the

agreement. It existed independently of any contract made by the parties, nor were their rights under the agreement in any manner affected by their failure to ask a partition of the real estate. It is sufficient to say it does not appear on the face of the pleadings that final distribution of the estate has taken place ten years preceding the commencement of this action.

II. Another ground of the demurrer was the answer "sets up a claim which was a proper one to have been filed against a —: —. the estate of Comfort Gillett within a year after granting letters of administration, and is, therefore, barred by the statute limiting the time for filing claims against estates." To this counsel for appellant responds by insisting the agreement and the allowance therein contemplated could not constitute a claim against the estate, because the contract was executed subsequent to the death of the intestate, and that every claim against an estate must be based on a contract or tort of the intestate; and this, we think, must be so.

III. The remaining ground of the demurrer was that "the pleadings show the plaintiff is seeking to partition the homestead, and by statute it is held exempt from any antecedent debts of their parents or their own."

It is sufficient to say that only one of the parcels of real estate sought to be partitioned constituted the homestead. Counsel for the appellee insist the allowance provided for in the agreement is a mere personal contract of the heirs, does not constitute a lien on the real estate, and cannot be enforced in this action because no such counter-claim can be pleaded herein. Code, § 3277.

The demurrer presents no such question, and therefore it could not have been considered in the court below and cannot be on this appeal.

REVERSED.

IN THE MATTER OF THE APPLICATION OF ELIZABETH SMITH.

1. **Conveyance: WHEN CONDITIONAL: CONSTRUCTION.** An instrument executed by a husband and wife, which by its terms is to operate as a conveyance of the lands therein described upon the performance by the parties of the second part of certain covenants therein contained, otherwise to be void, constitutes an executory contract, which does not operate as a present conveyance, and cannot be enforced by the parties of the second part after default.
2. —: —: **CONDITIONS PRECEDENT.** If such instrument be regarded as a deed, the covenants contained therein to be performed by the grantees would constitute conditions precedent, and the title to the lands would not pass until their performance.
3. **Practice: PLEADING: CHARACTER OF DEFENSE.** In a proceeding by a widow for the admeasurement of her dower, an intervenor set up a conveyance through which he claimed title to certain lands from her and her deceased husband, to which she replied by averring that the instrument through which the intervenor claimed never became operative as a conveyance because of his failure to perform certain covenants therein which constituted a condition precedent: *Held*, that the issues raised by her reply were of a purely legal character.

Appeal from Linn Circuit Court.

SATURDAY, JUNE 11.

ELIZABETH D. SMITH, widow of Jackson Smith, filed in the Circuit Court of Linn county, sitting as a court of probate, a petition asking that her interest in the lands of her deceased husband be set apart by admeasurement. The heirs of the husband were made defendants to the petition. F. M. Hill, the husband of a daughter of plaintiff and Jackson Smith, deceased, filed a petition of intervention, alleging that he is the owner of the undivided three-fifths of the lands, which he claims under an alleged deed of conveyance executed by Jackson Smith in his lifetime, in which the plaintiff joined, whereby the intervenor acquired all her title and interest in the lands. He asks to be allowed to intervene in the case, and that the application for admeasurement be dis

In the Matter of the Application of Elizabeth Smith.

missed. A copy of the conveyance under which he claims is made an exhibit to his petition.

The plaintiff answered the petition of the intervenor admitting the execution of the instrument under which he claims, but denying that it has the effect to convey the lands, and alleged that, by its terms, it is to become operative only upon a performance of the conditions and covenants therein expressed which the intervenor and the other parties thereto bound themselves to perform, and that they have wholly failed to perform their covenants. To this answer the intervenor demurred, on the grounds: 1, the Probate Court has no jurisdiction of the matters alleged in the answer, which are cognizable only in a court of equity; 2, the answer sets up no defense to the intervenor's petition; 3, the answer fails to show that the rights of the intervenor have been declared forfeited by a judicial adjudication. The demurrer was overruled, and, the intervenor standing thereon, judgment was entered granting the relief sought in the petition of plaintiff. The intervenor appealed.

J. B. Young, for appellant.

C. J. Deacon, for appellee.

BECK, J.—I. The first question presented for our consideration involves the construction and effect to be given the instrument which, the intervenor claims, operates as a conveyance of the lands.

The writing in question and our views as to its construction will be better understood by our presenting its material parts. They are as follows:

“This indenture, made and executed this 4th day of October, A. D. 1878, by and between Jackson Smith and Elizabeth C. Smith, of the county of Linn, and State of Iowa, parties of the first part, and Charles C. Smith, William L. Smith, Enoch B. Smith, Franklin Smith and F. M. Hite, parties of the second part, also of Linn county, State of Iowa, witnesseth

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that the said parties of the first part, in consideration of the payment of the several sums and amounts hereinafter named, and of the performance of the stipulations and agreements hereinafter specified, have bargained and sold, and by these presents do grant, bargain, sell and forever quit claim unto the said parties of the second part, their heirs, executors, and assigns, all our interest, claim or demand in and to the following described real estate, situated in the county of Linn, and State of Iowa, subject, however, to the conditions hereinafter named, and this conveyance to become operative and of force only upon the performance of said conditions. [Here follows a description of the lands.]

“The said parties of the second part, in consideration of the covenants and agreements herein above set forth, and in further consideration of the assignments made to them this day by the said party of the first part, Jackson Smith, of all his personal property of whatsoever nature or kind, do hereby assume and agree to pay all debts and liabilities of the said party of the first part, Jackson Smith. Said debts and liabilities, as nearly as can be ascertained, being as follows, to-wit. [Here follows a statement of the debts.]

“The said parties of the second part hereby covenant and agree with the said parties of the first part to devote all their time and energy towards the payment of all the debts and liabilities aforesaid, and that they will pay all taxes and assessments due or to become due on said land, and further agree that all the proceeds of the said lands herein conveyed shall, as fast as released from year to year, be applied toward the payment of said debts, saving and reserving to the said second parties what may be necessary for their personal support and that of their families, and upon the payment and discharge by the said second parties of all the debts and liabilities above mentioned and all costs and expenses accrued or to accrue thereon, including all attorney fees, then the title to all the lands herein described shall rest fully and completely in the said second parties, without the execution of further

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conveyance or conveyances; to have and to hold the same to the said second parties, with all the appurtenances thereunto belonging, and unto their heirs, executors and assigns, and the said party of the first part, Elizabeth C. Smith, wife of Jackson Smith, for the foregoing consideration and subject to the conditions and agreements herein before specified, relinquishes all her right of dower in and to the above described premises. It is further agreed that should any of the said second parties fail or refuse to perform his agreements herein contained, then said second party so failing or refusing shall forfeit all rights to or interest in said land herein described, and all claim thereon for labor performed or services rendered under this agreement, and the title to all said lands shall vest in the said parties of the second part who shall continue in the performance of their agreements herein contained, who shall finally pay off, and should all said second parties fail or refuse to perform their covenants and agreements herein set forth, then this conveyance to be wholly inoperative and of no force and void, and the title to all said lands shall be and remain in the said parties of the first part as absolutely as though this instrument had never been made, without any claim to said second parties for labor performed or services rendered under this agreement."

II. Counsel for the intervenor insists that the instrument is an absolute conveyance of the lands, and that the conditions found therein are in the nature of covenants, whereby the intervenor is bound to make payment of the debts specified, or, if they cannot be construed to be covenants, they are conditions subsequent. In either case it is claimed that the title passed by the instrument, which ought to be regarded as a conveyance.

Counsel for plaintiff denies this position and maintains that the instrument is not an absolute conveyance, and the conditions are precedent, and must be performed before the title will vest in the intervenor. This statement presents the question arising upon this branch of the case.

The instrument must be construed to accord with the intentions of the parties, as disclosed by the writing itself, and by the application of the rules of the law requiring resort, if it be necessary, to other means of construction.

The language first used in the writing is that of an absolute conveyance, which, however is followed by these words, "subject, however, to the conditions hereinafter named, and this conveyance to become operative and of force only upon the performance of said condition." Here is a positive declaration that the instrument shall not become operative as a conveyance until the conditions are performed.

In the next paragraph of the writing, as above set out, it is declared that "the said parties of the second part [intervenor and others], in consideration of the covenants and agreements herein above set forth, and in further consideration of the assignment made to them" of certain personal property, "do hereby assume and promise to pay all debts," etc., etc. The parties here describe the writing not as a conveyance of lands, but as containing "covenants and agreements." These are not words that can be applied to that part of the deed which operates to convey lands. If the parties had understood the instrument to have the effect to vest a present title, they surely would have here declared that it was the consideration upon which covenants for payment of the debts were based. It is further provided in the writing that upon the payment of the debts contemplated by the parties "then the title to all the lands herein described shall rest [vest] fully and completely in the said second parties without the execution of further conveyance or conveyances." The intention of the parties, as here expressed, is that the title shall not pass until the conditions are performed.

And, finally, it is declared that "should all of the second parties fail or refuse to perform their covenants and agreements herein set forth, then this conveyance is to be wholly inoperative and of no force, and void, and the title to all of said lands shall be and remain in the said parties of the first

part, as absolutely as though this instrument had never been made." Here is a declaration, in language which cannot be made plainer, that if the intervenor and his co-obligors fail to pay the debts they undertook to discharge the title shall remain in Smith, the other party to the instrument.

We think the language of the writing clearly and unmistakably discloses the intention of the parties to be, in effect, that the title remains in Smith, and shall pass to the intervenor only upon the performance of the obligation assumed by him and his associates. The writing, therefore, witnesses an executory contract upon the part of plaintiff and her deceased husband, which cannot be enforced by the other parties thereto after they have made default as to their covenants. See Bingham on the Sale of Real Property, p. 11, *et seq.*

III. But, if the writing be regarded as a deed of lands, it is plainly a conveyance of an estate on conditions. The expression: —: press language of the instrument demands that condition: precedent. the condition be regarded as precedent. It must, therefore, be performed before the estate will vest. The demurrer of the intervenor to plaintiffs' reply admits its allegations to the effect that the conditions have not been performed. No estate, therefore, has vested in the intervenor, under the instrument in question, if it be conceded that it ought to be regarded as a deed. These conclusions are based upon familiar elementary principles of the law, and do not demand for their support the citation of authorities.

IV. The foregoing discussion disposes of the second and third grounds of the demurrer. We will proceed to the consideration of the first, which is substantially that 3. PRACTICE: pleading: character of defense. the proceeding for the admeasurement of plaintiff's dower is at law, and matters alleged in her reply are only cognizable in equity.

Consideration of the case will readily satisfy the mind that the objection thus raised is not well taken. The plaintiff claims that her interest in her deceased husband's estate be admeasured; the intervenor insists that she has no interest

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in the lands, for the reason that she united with her husband in a conveyance thereof, under which the intervenor claims; plaintiff replies that the instrument whereon the intervenor bases his claim does not vest him with the title of the lands, for the reason that it is not a conveyance of a present interest therein. Now, surely, if the proceeding is to be regarded as an action at law, plaintiff may set up as a defense to the intervenor's claim that the instrument whereon it is based does not operate to convey title, that it is an executory contract, or, if a deed, it conveys an estate upon conditions precedent, and that as the covenants of the intervenor, which constitute the conditions in the contract or conveyance, are precedent, and have not been performed, no estate or interest in the lands has vested in the intervenor; in other words, that he has no title in the lands. Surely this is not "a matter that is cognizable only in a court of equity." It is a simple legal defense, pleaded against a claim of title to the lands which the intervenor sets up in his petition.

We conclude that the Circuit Court rightly overruled the demurrer to plaintiff's reply. The judgment is, therefore,

AFFIRMED.

 McNAMEE v. CARPENTER.

1. **Promissory Note:** ACTION ON: JOINT OWNERS. One of two joint owners of a promissory note cannot maintain an action thereon in his own name without joining the other owner, though the note is payable to bearer and is in his possession.

Appeal from Fayette Circuit Court.

SATURDAY, JUNE 11.

ACTION upon a promissory note executed by the defendant to Mason A. and Phebe King. Mason A. King is dead, and the action is brought by the plaintiff as administrator of his

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estate. The defendant for answer averred, among other things, that Phebe King was the owner of one half of the note, and the jury found specially that this allegation was true. They also found that the plaintiff's intestate at the time of his death was the owner of the other half. There was no general verdict, but the court rendered judgment in favor of the plaintiff for the full amount of the note. The defendant appeals.

James Cooney and D. W. Clements, for appellant.

C. B. Kennedy, for appellee.

ADAMS, CH. J.—If the defendant is liable to Phebe King for one half of the note, it was his right to resist the recovery of judgment by plaintiff for the full amount. He might, indeed, resist any recovery, for defendant should be subjected to but one action. The Code contemplates that the joint owners of a note should, in a suit thereon, be joined as plaintiffs, unless some refuse to join, in which case the joint owners so refusing should be made defendants. Section 2548.

The plaintiff, however, insists that the action was rightly brought, because the plaintiff held the legal title to the half owned by Mrs King, as well as to the other half. This position is based upon the fact that the note is payable to bearer, and the undisputed evidence was that Mrs. King delivered the note to plaintiff. But the plaintiff was as much entitled to possession as she was, by reason of the mere fact that he held the title to one half as administrator. We discover nothing in the evidence tending to show that Mrs. King, by delivering the note to the plaintiff, intended to affect her right or interest in the same. She may have intended that the plaintiff should put the note in suit, if not collected otherwise, but she doubtless supposed that if he did so he would cause it to be sued in the manner required by law where a note is owned jointly by two persons. It appears to us that the record does not show that the plaintiff was entitled to

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judgment. Having reached this conclusion it is unnecessary to consider the other points raised by the defendant. It will be time enough to consider them when the proper persons are made parties.

REVERSED.

LEWIS V. GARRETSON.

1. **Evidence: DEGREE OF PROOF: CRIMINAL ACT.** In a civil action only a preponderance of evidence is required to establish a fact, though it is the doing of an act which constitutes a crime. Following *Welch v. Jugenheimer*, ante, 11.

Appeal from Iowa Circuit Court.

SATURDAY, JUNE 11.

ON the 1st day of December, 1875, W. B. Spencer and P. C. Dillon executed to H. F. Garretson, or bearer, their promissory note for \$527.00, due six months after date. On the back of said note is the following indorsement:

"May 30th, 1876. Notice of demand and protest waived.
G. P. ENGLEBECK."

The defendant, Garretson, upon a separate piece of paper guaranteed the collection and payment of this note as follows:

"VICTOR, IOWA COUNTY, IOWA, JAN. 14, 1876.

"This is to certify that I hereby guarantee to Geo. F. Lewis the collection, without any cost or charge to him, and the payment in full to him of a certain promissory note made by Wm. B. Spencer and P. C. Dillon, for the sum of \$527.00, with interest at ten per cent. per annum, dated December 1st, 1875, payable six months after date, according to the true intent and meaning of said promissory note, as indorsed by Geo. P. Englebeck.

H. F. GARRETSON."

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The plaintiff alleges that he is the owner of the promissory note, and thereon, and upon the guaranty above set out, he sues. In an amendment to the petition it is alleged that Englebeck indorsed his name on the note, as a guarantor, on the 14th day of January, 1876, before the sale of said note to the plaintiff. The defendant, for answer, amongst other defenses, alleges that on or about the 14th day of January, 1876, Englebeck signed his name in blank on the said note; that afterwards the words: "May 30th, 1876. Notice of demand and protest waived," were written above his signature, without the knowledge and consent of Englebeck, and increased his liability, by reason whereof he was released from all liability on said note; that Englebeck guaranteed the payment of said note prior to the guaranty of defendant, and that defendant's contract was not a part of the same transaction, and that the release of Englebeck releases defendant.

The plaintiff replies, admitting that Englebeck indorsed said note prior to the making of the contract by Garretson, and that the words over Englebeck's name were placed there at the date thereof, but denying that the same was done without Englebeck's consent and authority.

There was a jury trial, resulting in a verdict for plaintiff for \$698.71. The defendant appeals.

T. P. Murphy, for appellant.

Hedges & Alverson, for appellee.

DAY, J.—It is apparent from the foregoing statement that it was a material inquiry whether the words above Englebeck's signature were written without authority or consent, and under such circumstances as would discharge him from liability upon his guaranty. Upon this branch of the case the court instructed the jury as follows:

"3. If you find from the evidence that the writing over the name of Englebeck, on the back of the note, and dated May

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30, 1876, was done by the plaintiff after the name of Englebeck was indorsed upon the note by him, and that the same was done without his knowledge and consent; and you further find that the name of Englebeck was indorsed upon the note at or before the time that the same was sold to the plaintiff and the defendant executed the written guarantee introduced in evidence before you, this would be such an alteration as would release the said Englebeck, and also defendant, from any liability in this case on the note or guaranty. And if the writing was put over the name of Englebeck after he indorsed the same, and whilst in plaintiff's possession, it is incumbent upon the plaintiff to explain the alteration, if any.

"4. But you will not be justified in finding that the note was altered as to the indorsement of Englebeck, falsely, with intent to defraud, by writing over his name words increasing the liability of said Englebeck, unless you are satisfied beyond a reasonable doubt that the same was true, and a preponderance of evidence is not sufficient to establish a forgery, or release a party on the ground of a forgery."

The 4th instruction is erroneous, and the giving of it, under the issues involved, was prejudicial to the defendant. See *Welch v. Jugenheimer*, ante, p. 11. The sufficiency of the evidence to support the verdict, and the other errors assigned, we need not consider.

REVERSED.

JORDAN ET AL. V. BROWN ET AL.

1. **Conveyance: VALIDITY OF: ESTOPPEL.** Where the owner of land agreed with the holder of a judgment against him that the latter should purchase a maturing tax sale certificate on the land, and take and hold the title under the same as security for the payment of his judgment, and in accordance with a further agreement between them the holder afterward sold and conveyed the property under the tax title, to one who had no knowledge that he held such title as security only, it was held that the former owner was estopped to claim that the title acquired by such grantee was not absolute.
2. **Tax Sale: ACTION TO RECOVER POSSESSION: STATUTE OF LIMITATIONS.** Facts considered under which it was held that an action to recover possession of land under a tax deed was not barred by the statute of limitations.
3. —: **DEED HELD AS SECURITY: REDEMPTION.** Where the holder of a judgment procured a tax deed to lands of the judgment debtor, which he agreed should be subject to redemption by the payment of the judgment, it was held that other claimants to the land, against whom, but for such agreement, the tax sale would have conveyed an absolute title, could only redeem therefrom by complying with terms of the agreement.
4. **Practice: PLEADINGS: ISSUES RAISED BY.** The issues raised by the pleadings held to warrant the decree entered.

Appeal from Wapello Circuit Court.

SATURDAY, JUNE 11.

DAVID BROWN, one of the defendants, was in 1866 the owner of certain lands which are in controversy in this action. In that year he executed a deed for the property to one Hunter, who within six days conveyed it to one Cowan.

Within six months Brown commenced an action against Hunter and Cowan to set aside the deed executed by him to Hunter, on the ground of fraud. Hunter made default, but the title of the land was declared to be vested in Cowan, as a *bona fide* purchaser without notice, and as to him the petition of Brown was dismissed. Brown continued in possession of the lands and did not abandon his claim thereto, but

56	281
86	157
56	281
894	115
56	281
131	116

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served a notice of an appeal. Before the time of perfecting an appeal had expired, one La Force purchased the lands of Cowan. On June 5th, 1872, La Force conveyed the lands to Barbara, the wife of Brown, the bargain and negotiations being made by Brown himself. Nothing was paid upon the purchase. Brown and his wife made their note for the purchase money, \$1,800, and \$200 on account of taxes paid by La Force, and executed a mortgage upon the land in question to secure their payment, dated June 17th, 1872. La Force transferred the mortgage to Davis, who obtained a decree foreclosing the mortgage, March 29, 1876.

On May 29th, 1867, whilst the suit of Brown against Hunter and Cowan was pending, one Forrester, the brother-in-law of David Brown, recovered a judgment against him for \$1,600, on which was paid, April 28th, 1868, \$811.90.

On the 5th of October, 1868, the lands were sold for taxes to Hackworth. Forrester, discovering that the lands had been sold for taxes, and that the time for redemption had nearly expired, visited Brown for the purpose of securing the redemption of the lands, in order to protect his judgment. It was finally agreed that Forrester should procure an assignment of the tax certificate, and when the time for redemption expired take a deed for the lands. Hackworth assigned the treasurer's certificate to Forrester, to whom a tax deed was executed, October 9th, 1871, which was recorded on the fourteenth of the same month. Forrester conveyed the lands to William A. Jordan, January 1, 1873. William A. Jordan and Barbara Brown both died before the commencement of this action. Barbara Brown left as her sole heirs her husband, David, and her children, Mary, Mack L., and Florence.

On October 5th, 1876, the plaintiffs, the widow and children of William A. Jordan, commenced this action for the recovery of the lands under the tax title already alluded to, making David Brown and certain others defendants. The children of Barbara Brown were first made defendants by an amendment to the petition filed January 24th, 1877, notice of

Jordan v. Brown.

which was served February 15th, 1877. On the 27th of July, 1878, the plaintiffs filed an amendment and supplement to their petition making Davis a party defendant, and praying that their title may be declared superior to the claim of Davis under his mortgage foreclosure.

The cause was transferred to the equity docket, and was tried as an equitable proceeding. The court decreed that the tax deed in question be treated as an equitable trust or mortgage to secure the Forrester judgment, the amount paid Hackworth, and taxes subsequently paid, with interest at six per cent; that as to the taxes it constitute a lien superior to the Davis foreclosure, but that as to the amount of the Forrester judgment it constitute a lien inferior and subject to the Davis foreclosure lien. All parties appeal.

Stiles & Lathrop, for plaintiffs.

William McNett, for defendants.

DAY, J.—I. An opinion was filed in this case at the last June term. Upon petition of the defendants a rehearing was granted, and the cause is again submitted for determination. The regularity of all the proceedings connected with the tax sale to Hackworth is admitted. Ordinarily, the effect of this sale, and of the deed made pursuant thereto, would have been to divest absolutely the title of the Browns, and of all parties holding under them. But the testimony, we think, supports the conclusion that it was agreed between Brown and Forrester that Forrester should take an assignment of the treasurer's certificate, and procure a treasurer's deed to secure the advances made by him in acquiring the tax title, and to secure the judgment which he then held against Brown. Under this arrangement Forrester held the title of the lands as a mortgagee. More than a year after this transaction Forrester, being pressed for money, urged payment of his judgment. Brown was unable to raise the money. At Brown's sugges-

1. CONVEY-
ANCE: valid-
ity of: estop-
pel.

 Jordan v. Brown.

tion Forrester sought a purchaser of the lands. A trade was finally made with Jordan. Brown advised the trade, and assisted in the negotiations. There is no evidence to authorize the conclusion that Jordan had notice that Forrester held the title of the lands as security. The sale was in the form of an absolute one, with no agreement or reservation to the effect that the title was to be upon any condition. Brown stood by and assisted in making the sale. He is estopped to claim that Jordan did not acquire an absolute title. As to the portion of the lands inherited by David Brown, the interest of all parties is divested absolutely by the tax title.

II. It is insisted that, as to children of Barbara Brown, the action to recover upon the tax title is barred by the statute of limitations. The children of Barbara Brown were not made defendants until February 15th, 1877, which was more than five years after the tax deed was recorded. The conveyance from Hackworth to Forrester, being, as we have seen, intended to secure the judgment of the latter, and the repayment of money advanced by him to acquire the tax title, operated as a mortgage between Brown and Forrester. The tax title would have been paramount to the title derived by Barbara Brown from La Force, and to the mortgage held by Davis, had it not been for this agreement. It would have operated to divest the title wherever it vested, and the children of Barbara Brown could have made no resistance to it, except upon the ground that the action is barred by the statute of limitations. Now the arrangement between Brown and Forrester, under which the latter acquired the tax title, was for the benefit of all the heirs, as it secured for them rights which otherwise would not have existed. Forrester held the title as a mortgagee, and the children of Barbara Brown, as well as David Brown, had the right of redemption until Forrester conveyed the lands. Under this arrangement neither Barbara Brown nor her heirs held title to the lands adversely to Forrester. As long as Forrester held title, the statute of

2. TAX SALE:
action to re-
cover posses-
sion; statute
of limitations.

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limitations did not run in favor of Brown, his wife, or, after her death, her heirs. While the relation of mortgagor and mortgagee, or of trustee and *cestui que trust*, existed between Forrester, the holder of the tax title, and Brown, neither party could have held or claimed the lands adversely to the other. An adverse claim of title must exist to enable a defendant in an action for the recovery of land to plead the statute of limitations. It follows that while Forrester held the title, the statute of limitations did not run against it.

It does not appear that the defendant, David Brown, had any authority by his conduct respecting the sale to Jordan to estop the other defendants, the children of Barbara Brown. The evidence shows that Forrester not only conveyed his tax title to Jordan, but he also assigned to him the judgment which he held against Brown. It must be conceded, independently of any question of estoppel, that Jordan did, by his purchase, at least succeed to the rights of Forrester as against all parties. Now, if at the time of Jordan's purchase the statute of limitations had not begun to run against Forrester, it had not begun to run as against Jordan. We need not determine whether the statute of limitations began to run when Jordan made his purchase, as the action was brought within five years of that time.

III. It follows from what we have said that, as to the interest of the children of Barbara Brown, the tax deed is to be treated as a mortgage, and not as constituting a title absolute. The question now arises as to the priority of lien between the amount secured by the tax title, and the amount secured by the La Force mortgage, now held by Davis. We have already said that Forrester procured the tax title to secure not only the advances made by him in procuring the title, but also the amount of his judgment against Brown. From the statement of facts, it appears that this judgment was obtained May 29, 1867, after the conveyance of the land to Hunter, and by Hunter to Cowan. The judgment was not, therefore, as to Cowan, who

3. —: deed:
held in secur-
ity: redemp-
tion.

Jordan v. Brown.

was decreed in the proper action to be an innocent purchaser, a lien upon the land. But, the tax sale being regular, Hackworth was in a position to acquire an absolute title as against Cowan and La Force, and Davis, the assignee of the La Force mortgage. The agreement between Brown and Forrester, by which this tax title became less than absolute, was beneficial to all parties including Davis. If Hackworth had taken the tax deed, or Forrester had unconditionally purchased the certificate of tax sale, and taken a deed, all interest of Davis would have been divested. Davis must accept the benefits of this agreement *cum onere*, and cannot be heard to insist that the tax deed shall not be held as security for the Forrester judgment.

IV. It is claimed, however, that no question of mortgage or trust is made in the pleadings, and that the decree, in so far as it is based upon the existence of a trust or mortgage, goes entirely outside of the issues in the case.

4. PRACTICE:
pleading : is-
sues raised by.

The plaintiff's original petition was in ejectment. The answer of David Brown denies the plaintiff's title, and alleges that defendant procured Forrester to purchase the certificate of Hackworth and take a tax deed to himself, which deed and title it was expressly agreed was to be taken and held by Forrester in trust for Barbara Brown, and as security for the money advanced for that purpose, and compensation for trouble, until Barbara Brown could refund the same. The answer prays that, in the event plaintiffs are adjudged to be subrogated to the rights of Forrester, an accounting may be had to ascertain the amount paid out by the said Forrester in pursuance of said agreement, to the end that the same, with interest, may be paid off by defendant, or made a charge and lien upon said lands, and for other relief as may seem equitable. The answer of the children of Barbara Brown adopts the averments of the answer of David Brown, and, in addition thereto, pleads the statute of limitations. The second amendment to the petition makes Davis a party defendant, and prays as follows:

Jordan v. Brown.

"That the said G. A. Davis may be made a party defendant to this proceeding, to the end that the rights of all the parties claiming an interest in or lien upon said lands may be settled by decree herein; that if, upon final hearing, plaintiffs' title be found to be in fee simple absolute, then that they have a decree removing the cloud cast upon it by said mortgage and decree of said G. A. Davis, and canceling the same and declaring plaintiffs' title absolute. Or if the court should find that plaintiffs' title is held by them in trust for any purpose, then that the court shall declare the same, and the extent thereof, and when thus ascertained shall declare the same superior to the mortgage and decree of said defendant Davis, and superior to all other claims." Upon the answer of the defendants, setting up that the plaintiffs' tax title was held simply in trust, the cause was transferred to the equity docket. The court was called upon to inquire into and determine whether the tax title was held in trust, and the nature of the trust. It is true the court found the trust to be of somewhat different character from that alleged in the answer. That is, the court found the tax title was procured to secure Forrester's judgment, as well as the sum which he might pay for the tax title. But the question of the existence of a trust being submitted properly to the court for determination, the court had a right to find and determine its character as disclosed by the evidence. The court was not bound, if it found a trust existed, to find that it was, in its entire scope and purpose, and the amount involved, precisely as charged in the answer. The court had jurisdiction, under the issues, and the relief asked, to determine whether Forrester acquired the tax deed under an agreement making his title merely equitable, and, if so, the nature of the agreement, and the extent of the rights acquired under it.

V. The plaintiffs insist that the court erred in allowing them only six per cent interest upon the taxes which they have paid upon the land in controversy. The decree of the court in this respect, we think, is correct.

 Jennings v. Jennings.

VI. It follows from what we have said that, as to an undivided one-third of the lands covered by the tax deed, the plaintiffs' title is absolute. As to the remaining undivided two-thirds of the lands included in the tax deed, the plaintiffs hold the tax deed as a mortgage, paramount to the lien of the La Force mortgage, and the Davis foreclosure thereunder, to secure the amount of the two-thirds of the amounts advanced for the tax certificate, and the subsequent payment of taxes. The decree is affirmed in all respects, except as above indicated.

REVERSED.

 JENNINGS V. JENNINGS.

1. **PRACTICE: FINDING OF FACTS.** A finding of facts may be made by the court on its own motion, and when so made has the same force and effect as though made at the request of the parties.
2. **DIVORCE: CUSTODY OF CHILD: RES ADJUDICATA.** Where the decree in an action for divorce awards the custody of a child to one parent it cannot be transferred to the other in a collateral action, but only by a change in the decree, obtained by direct proceedings for that purpose.

Appeal from Davis District Court.

MONDAY, JUNE 13.

A WRIT of *habeas corpus* was sued out by the plaintiff, a minor, at the instance of Julia Jennings, his mother, to test the question whether he was illegally restrained by the defendant, his father. The court adjudged the said Julia was entitled to the custody, and so awarded. The defendant appeals.

Trimble, Carruthers & Trimble, for appellant.

Traverse, Payne & Eichelberger, for appellee.

SEEVERS, J.—Julia Jennings and the defendant were divorced by the District Court of Lee county, in February, 1873. The plaintiff is their child, and was then about eleven months old; and the Lee District Court, at the time the decree of divorce was rendered, further decreed the said Julia should have the care and custody of the plaintiff. Since the plaintiff was about eighteen months old, the defendant has had the custody of the plaintiff, and, upon demand being made, the defendant refused to surrender the plaintiff to the said Julia.

The defendant made return to the writ in form of an answer to the petition upon which it was based. He admitted the divorce, but failed to controvert the fact that the custody of the plaintiff had been awarded to the said Julia by the said District Court, and pleaded that the said Julia had given the defendant the care and custody of said child, in 1874, and had then and thereby waived and surrendered all her rights under the decree; that said Julia was not so situated that she could properly take care of said child, and that his best interests required he should remain with the defendant.

The District Court made a special finding of facts; the material portion thereof, in substance, in addition to what has been stated, are as follows:

“2. That the District Court of Lee county decreed, at the time the divorce was granted, that the said Julia should have ‘the custody and control’ of the plaintiff.

“6. * * * That the said Julia, when the plaintiff was about eighteen months old, requested the defendant to take the child and provide for him.

“8. That during said time his mother has frequently visited him, brought him presents, and has not lost her affection for him.

“9. That the said Julia is now as well able to take care of the said Augustus as she was when the decree was granted; that she earns considerable money by her occupation, is of good moral character, and, to all appearances, a worthy woman.

Jennings v. Jennings.

"10. That the defendant appears to be in all respects a worthy man; is a physician by profession, and well able to take care of the said Augustus. I take pleasure in speaking of the fairness and candor with which the said Thomas and Julia testified in this case. I could see nothing in either except an earnest desire to speak the truth as they understood it.

"11. I find that when the said Julia left the said Augustus with the defendant nothing was said in regard to the length of time he should remain with his father; that the defendant supposed that he was to remain with the defendant, and that said Julia had waived all right to him under the decree. But I find also that the said Julia did not so intend.

"14. That she has not waived or surrendered said right to the defendant. * * * * *

I. The evidence as to some of the facts found was conflicting. Especially is this so as to the pivotal question whether the said Julia waived or surrendered the right to the custody of the plaintiff, by the decree of the Lee District Court. The evidence on this point consisted of the statements of the defendant and the said Julia, and, to put it strongly for the defendant, it may be said to have been in direct conflict. This being an action by ordinary proceedings, or at law, the finding has the force and effect of a verdict of a jury, and this court is bound thereby. *Shaw v. Natchwey*, 43 Iowa, 653; *Drumb v. Keen*, 47 Id., 435.

Counsel for appellant insist we are not bound by the finding, because the court was not requested by either party to
 1. PRACTICE: make it, as provided in Code, § 2743. We, how-
 finding of
 facts. ever, think the court may do this on its own mo-
 tion, and the effect is the same as if it had been done at the request of the parties, or one of them. Of necessity, the court must find the facts before the law can be declared, and it is immaterial whether the facts as thus found are set out in the record or not. As a matter of practice we think the bet-

Jennings v. Jennings.

ter course is for the court in all cases to set out the facts found in the record.

II. The decree of the Lee District Court gave the said Julia the custody of the plaintiff. She has never waived or surrendered such right, and is as well able to take care of, and as much entitled to the custody of, the plaintiff as when it was rendered. There is no escape from this conclusion under the facts found.

The result follows that the defendant seeks to supersede the decree in a collateral proceeding on the single claimed ground, to state it strongly for the defendant, 2. DIVORCE: custody of child: res adjudicata. that the welfare of the plaintiff requires the defendant should have his care and custody. This, we think, cannot be done without overturning well established rules that have been frequently declared by all courts, without, it may be said, an exception. As applicable to this class of cases, see *Williams v. Williams*, 13 Md., 523; *Wakefield v. Ives*, 35 Iowa, 238; *Hoffman v. Hoffman*, 15 Ohio St., 427.

The statute provides the court may make "subsequent changes" in the decree in reference to the custody of the children, when circumstances render them expedient. Code, § 2229. Evidently this contemplates a proceeding brought for the purpose of obtaining a change in the decree. In the absence of this being done, the decree, as originally entered, must amount to an adjudication.

AFFIRMED.

BIRD V. ADAMS ET AL.

1. **Deed: DATE OF EXECUTION: EVIDENCE TO IMPEACH.** A very strong presumption exists in favor of the correctness of a deed as to the date of its execution recited therein, and shown by the certificate of the notary taking the acknowledgment. Evidence held insufficient to overcome such presumption.

Appeal from the Superior Court of Cedar Rapids.

MONDAY, JUNE 13.

IN November, 1877, the defendants, Adams and McDaniel, recovered a judgment in the court below against one James Bird. On the 30th of July, 1878, a transcript of said judgment was filed in the office of the clerk of the Circuit Court of Linn county, execution was issued thereon and a levy was made upon certain real estate in the city of Cedar Rapids.

Thereupon the plaintiff, Wm. M. Bird, commenced this action in equity to enjoin the sale of said property, claiming that he was the absolute owner thereof, and that the same is not liable to execution as the property of James Bird.

The defendants answered, averring that James Bird was the owner of said property; that in October, 1878, a deed for the property, made by James Bird to the plaintiff, was filed for record; that the deed purports to have been made on the 25th of September, 1877, but that it was not actually made until more than one year thereafter; and that it was without consideration, and antedated either by mistake or for the fraudulent purpose of cheating, hindering, delaying and defrauding creditors. There are other averments in the answer which are not necessary to be stated here. The prayer of the answer was that the injunction, which had been before granted, be dissolved. There was a trial by the court and a decree was entered dissolving the injunction, and declaring the judgment to be a lien upon the property superior to any

Bird v. Adams.

interest held by the plaintiff, and ordering that special execution issue to enforce said lien. Plaintiff appeals.

J. B. Young and Preston Bros., for appellant.

J. W. Weyand and Rickel & Eastman, for appellee.

ROTHROCK, J.—The defendants by their answer base their right to subject the land to the payment of the judgment upon the alleged fact that the deed was actually executed after the judgment became a lien, but was dated back to a time before the judgment was rendered. The deed was not filed for record until October, 1878.

1. DEED : date
of execution :
evidence to
impeach.

The plaintiff introduced in evidence a deed from James Bird, dated September 25, 1877, and acknowledged the same day, which conveyed the property to the plaintiff. It cannot be denied, in view of the evidence in the case, under the issues, that the deed, although unrecorded, would convey the title to the plaintiff, and that he would hold the property clear of the lien of any judgments thereafter rendered against James Bird.

The defendants, in support of the allegations of their answer, introduced the plaintiff as a witness, who testified that the deed was received by him in two or three days after its date. James Bird also testified that he executed the deed to the plaintiff on the day of its date, and sent it from Chicago to the plaintiff by mail. To rebut this evidence, the defendants rely on the testimony of a witness who stated that at the time of a fair at Cedar Rapids, in 1878, the plaintiff and James Bird had a conversation, in which James Bird said to plaintiff that it was best to have a deed, and an unrecorded deed; that plaintiff asked James Bird where he could get it, and that he replied that he had a place in Chicago, or New York, where he could get it. This witness admitted that he was not on friendly terms with the plaintiff. Other witnesses testified that James Bird was not, as they remembered,

Bird v. Adams.

at Cedar Rapids at, or shortly before, the date of the deed, as claimed by the plaintiff. Another witness testified that said Bird was at the fair at Cedar Rapids in 1877. Upon this evidence, and what is claimed to be some contradictory statements by the plaintiff, the defendants claim that the decree of the court below should be sustained.

It appears to us counsel underestimate the force and effect which should be given to the deed itself, and to the acknowledgment thereto. The certificate of the officer, dated on the 25th day of September, 1877, should in our judgment be held to prevail over all the oral evidence which in this case impliedly contradicts it. If the titles to real estate should be allowed to be impeached, and the date of conveyances be controlled and changed by evidence of loose and random conversations between the parties thereto, the right of property would rest on a very insecure and unsafe foundation.

It will be understood that we are determining this case upon a trial *de novo* on the issues joined, and upon the evidence. Whether, if the defendants had by cross bill set up the insolvency of James Bird, and that the conveyance was fraudulent as to the defendants, and prayed a cancellation of the deed, they would have been entitled to a decree we cannot determine. It would seem that as the debt for which the judgment was rendered was contracted after the conveyance of the property, there would be a question as to defendant's right to subject the property to the satisfaction of the judgment. But with this, under these issues, we have no concern.

The plaintiff should have a decree making the injunction perpetual, which at his election he can have in this court, or in the court below.

REVERSED.

PARKER v. NORRIS.

1. **Venue: ACTION IN REPLEVIN: EVIDENCE.** The exclusion of evidence offered in support of a motion for change of venue, and tending to prove that the action was not brought in the proper county, held erroneous.

Appeal from Pottawattamie Circuit Court.

MONDAY, JUNE 13.

ACTION in replevin. The defendant moved for a change of place of trial to Page or Montgomery county, on the ground that the action should have been brought in one of those counties and not in Pottawattamie county. The court overruled the motion, to which the defendant excepted. There was a trial by jury and verdict and judgment were rendered for the plaintiff. The defendant appeals.

M. M. Wright and *W. S. Mayne*, for appellant.

Dailey & Burke, for appellee.

ADAMS, CH. J. The action was brought against Frank Bailey, who afterwards died. G. W. Norris was substituted as his administrator. The application for a change in the place of trial was based upon the alleged ground that Bailey was a resident of Page county, and that all the property taken under the writ from his possession was at the time of the commencement of the action either in that county or in Montgomery county. The application was resisted upon the ground that it was not true as claimed that Bailey was a resident of Page county, and not true as claimed that all the property taken from his possession was at the time of the commencement of the action either in that county or Montgomery county. But on the other hand it was claimed that Bailey was a resident of Pottawattamie county, and a part of the property taken from his possession was at

1. **VENUE: ac-**
tion of re-
plevin: evi-
dence.

Parker v. Norris.

the time of the commencement of the action in that county. The application was further resisted upon the ground that the plaintiff's petition showed that the property was wrongfully removed from Pottawattamie county.

Upon the hearing upon the application affidavits were introduced upon both sides, and witnesses were examined.

It appeared that a writ of replevin was issued to the sheriff of Pottawattamie county. The property taken by him consisted of a bridle and a mare. All the other property was taken in Page county, and under a writ issued to the sheriff of Page county. The defendant contends that the bridle was never in Bailey's possession but in the possession of the plaintiff, and that while the mare was at one time in Bailey's possession, it was, while in his possession, in Page county, and before it was taken by the sheriff of Pottawattamie county it had passed out of Bailey's possession into plaintiff's possession, and was in the plaintiff's possession when taken under the writ. The defendant offered evidence of these facts, but the plaintiff objected and the court sustained the objection, to which the defendant excepted.

An action in replevin must be brought in the county where one of the defendants resides or some portion of the property is situated. *Hibbs v. Dunham*, 54 Iowa, 559. Section 3230 of the Code, which provides that where the petition shows that the property has been wrongfully removed into another county from the one in which the action is commenced an order may issue and be served in any county where the property may be found, was not designed to provide in what county the action may be brought. *Hibbs v. Dunham*, above cited. To justify the court below, then, in overruling the motion for change of place of trial, it must have been found either that Bailey was a resident of Pottawattamie county or that some portion of the property was situated in that county. The bridle it appears was in that county. But if the fact is as the defendant claims, that the bridle was never in Bailey's possession, but was in the plaintiff's possession, it was not

Mudge v. Agnew.

the subject of replevin, and the taking of it by the officer in Pottawattamie county could not have the effect to give the plaintiff the right to bring the action in that county. Nor could such right be acquired by the taking of the mare in that county, if at the time the action was commenced it was in Page county, and before it was taken it had passed into the plaintiff's possession. It appears to us that the defendant was entitled to show these facts as claimed by him in regard to the bridle and the mare. It is true the court may have come to the conclusion that Bailey was a resident of Pottawattamie county and overruled the motion upon that ground alone.

If the court had so specially found we should not deem it our province to disturb the finding, because the evidence is conflicting. But we are by no means certain that the ruling was placed upon this ground. We cannot say, therefore, that the defendant was not prejudiced by the exclusion of the evidence in question.

REVERSED.

MUDGE V. AGNEW.

1. Practice in the Supreme Court: ABSTRACT: MOTION TO STRIKE.

An abstract must be based on the record in the court below, and where it is shown that no evidence was made of record in a cause, what purports to be the evidence set out in the abstract will be stricken therefrom on motion.

Appeal from Muscatine Circuit Court.

MONDAY, JUNE 13.

THIS is an action to recover damages for certain alleged malicious prosecutions instituted by the defendant against the plaintiff. There was a trial by jury which resulted in a verdict and judgment for the plaintiff. Defendant appeals.

Mudge v. Agnew.

J. Carskadden, for appellant.

Cloud & Cloud and *Hoffman, Pickler & Brown*, for appellee.

ROTHROCK, J.—I. With the submission of the cause there was presented by appellee a motion to strike from appellant's abstract what purports to be the evidence in the cause, upon the ground that the record does not show that the same was preserved by bill of exceptions, nor otherwise made part of the record. This motion is supported by a certificate of the clerk of the Circuit Court to the effect that no bill of exceptions has ever been filed. The appellant resists the motion, not by producing a transcript showing that the evidence was properly made of record, but by the claim that his abstract purports to contain all the evidence, and that such statement in the abstract is sufficient. The abstract would be sufficient if it were founded on the record as made in the court below. But if it sets forth evidence not made of record it is the right of the appellee, on motion, to have such evidence stricken from the abstract. This is the constant practice in this court. We think the motion must be sustained.

II. Exceptions were taken to certain instructions given by the court to the jury. As we have no evidence in the case these instructions cannot be properly considered without at least some statement as to what facts the evidence tended to establish. An instruction may not state all of an abstract proposition of law and yet be complete as applicable to the facts of the case. *Kyser v. K. C. St. J. & C. B. R. Co.*, ante 207. The instructions complained of in this case are of this character. There may have been such a state of facts as fully warranted the giving of them.

AFFIRMED.

MARLOW V. MARLOW.

- 1. Appeal: AMOUNT IN CONTROVERSY:** Where a tender made by the defendant reduces the amount in actual controversy in an action to less than one hundred dollars, no appeal will lie except upon a question of law certified by the trial judge.

Appeal from Winneshiek Circuit Court.

MONDAY, JUNE 13.

THIS action is brought upon a note executed by E. G. Marlow and W. Sanford, to the order of W. H. Manning, for the sum of \$600, due three months after date, with interest at the rate of ten per cent after maturity, and providing that should proceedings be commenced for its collection ten per cent should be allowed as attorney's fee. The petition claims the sum of \$763.51, with interest at ten per cent from September 7, 1880, and an attorney's fee of \$76.35. The answer admits the execution of the note, and sets up certain facts from which immunity from the payment of an attorney's fee is claimed, and alleges that after the service of notice defendant paid to the Sheriff the sum of \$773, and requested the sheriff to deliver the same to the clerk of the court for the use of the plaintiff, and said sum is now in the hands of the clerk, and offers plaintiff judgment for said sum without costs or attorney's fees. The evidence tends to show that the plaintiff, who is the defendant's brother, procured the note after it was due, and that he instituted suit upon it without demanding payment or informing the defendant that he held the note, merely for the purpose of subjecting the defendant to the payment of attorney's fees and costs. The evidence shows, and the court found, that the defendant, on the second day of the September term, being September 7, 1880, paid to the clerk on the demand in question \$765.30, and \$9.85 costs, being the full amount of the note and interest and costs due to that time. The court rendered judgment in favor of plaintiff for

Marlow v. Marlow.

the amount of the tender, refused to allow an attorney's fee, and rendered judgment against plaintiff for \$21.28, costs accrued since the tender. The plaintiff appeals.

Brown & Wellington, for appellant.

L. Bullis, for appellee.

DAY J.—The defendant admitted the execution of the note, and tendered the entire amount due and all that was claimed thereon, and the costs accrued up to the time of filing his answer. The entire amount in controversy as shown by the pleadings was the attorney's fee, alleged in the petition to be \$76.35. The amount in controversy, as shown by the pleadings, being less than one hundred dollars, no appeal lies without a certificate of the trial judge that the cause involves the determination of a question of law upon which it is desirable to have the opinion of the Supreme Court. Code, § 3173. No such certificate has been made in this case. It follows that the appeal must be dismissed. This result is not at all unsatisfactory to us, as the record affords abundant evidence that the plaintiff instituted the suit for no other purpose than that of harassing his brother, and needlessly subjecting him to the payment of attorney's fees and costs.

APPEAL DISMISSED.

In the Matter of the Will of Mary M. Caywood.

56	301
95	470

IN THE MATTER OF THE WILL OF MARY M. CAYWOOD.

1. **Practice in the Supreme Court: ABSTRACT: AMENDMENT.** An amendment to the appellants' abstract, filed by him without leave after the filing of the appellee's argument, will not be considered.

Appeal from Fayette Circuit Court.

MONDAY, JUNE 13.

ON November 18th, 1879, there was filed on the probate docket of the Circuit Court of Fayette county the petition of Charles, Silas H. and Judson C. Stevens, asking an order of the court requiring the clerk to pay over to petitioners certain moneys in his hands as trustee, the said moneys being the proceeds of the sale of certain property included in the will of Mary M. Caywood, deceased. Afterward Howard and Mabel Stevens, minors, by their father, Silas H. Stevens, filed a petition, asking an order directing the clerk to pay over to them one-half of the money in his hands, and that he proceed to collect the balance due on a note in his hands and pay one-half thereof over to them. Afterward the petition of Homer C. Stevens, by his father, Charles Stevens, was filed, asking an order directing the clerk to pay over to him the remaining one-half of the money, and of the proceeds of a note in his hands.

Afterward William Caywood filed a petition of intervention, asking an order upon the clerk to pay over to him the moneys and the proceeds of the notes in his hands.

The court dismissed the intervenor's petition, and adjudged that the money in the hands of the clerk be paid to Howard and Mabel Stevens, and to Homer C. Stevens, each one-third. The intervenor appeals.

James Cooney and Hoyt & Hancock, for appellant.

Thompson Bro's and D. W. Clements, for appellees.

In the Matter of the Will of Mary M. Caywood.

DAY, J. This proceeding involves the construction of the will of Mary M. Caywood, deceased. The proceeding is entitled in equity. No errors are assigned. The case, if reviewable here at all, is triable *de novo*. The original abstract of appellant does not purport to contain all the testimony. Appellees urge this in their argument, and insist that for this reason, amongst others, the judgment must be affirmed. After the appellees' argument was filed, the appellant, without leave of court, filed an amendment to his abstract, stating that the abstract theretofore filed contains all the evidence received and offered in the cause. The appellees filed a motion to strike the amendment to the abstract from the files. This motion was submitted with the case for determination. The motion must be sustained. We cannot sanction the practice of permitting an appellant, after the appellee has argued his case, and without leave, to amend his abstract, and substantially change the record upon which the cause is submitted. The abuses which would attend such a practice readily suggest themselves. If leave to amend had been asked, it might have been granted upon such terms as seemed proper under the circumstances. In *Betts v. City of Glenwood*, 52 Iowa, 124, we held that an amended assignment of errors, filed without leave, after the filing of the appellees' argument, could not be considered. See, also, *Rogers v. Carman*, 54 Iowa, 715. The appellant relies upon *Goodykoontz v. Ringland*, 52 Iowa, 732, and insists that a statement that the abstract contains all the evidence is sufficient although made only in his argument in reply. It is apparent from the opinion in the case referred to that the attention of the court was not directed to the manner of making the amendment, but to its sufficiency. The amendment was held to be insufficient. That holding disposed of the only question before the court. Besides, the amendment in that case was attached to the end of appellant's opening argument, and was not de-

Dunham, Buckley & Co. v. Greenbaum, Schroder & Co.

ferred until appellee had filed his argument, and no objection was made to the time or manner of the amendment.

As the cause is triable here *de novo*, if reviewable at all, the striking out of the amendment to the abstract renders an affirmance of the judgment necessary.

AFFIRMED.

56	303
100	178
56	303
113	715

DUNHAM, BUCKLEY & Co. ET AL. V. GREENBAUM, SCHRODER & Co. ET AL.

1. **Intervention : GENERAL ASSIGNEE: ATTACHMENT.** An assignee for the benefit of creditors may intervene in an attachment suit brought against his assignor prior to the assignment, and set up a claim against the plaintiff therein for damages sustained by his assignor by reason of the wrongful suing out of the attachment, and this although the assignor has himself pleaded the same as a counter claim.

Appeal from Des Moines District Court.

MONDAY, JUNE 13.

E. S. TAYLOR filed a petition of intervention which plaintiffs moved to strike. The motion was overruled, and from this decision plaintiffs appeal.

Hall & Huston, and Martin, Murphy & Lynch, for appellant.

Newman & Blake and Smyth & Son, for appellee

BECK, J.—I. The several plaintiffs brought separate actions by attachment against Greenbaum, Schroder & Co., and upon the writs issued therein the stock of merchandise of defendants was seized. Gilbert, Hedge & Co., brought an action against defendants, and certain mortgagees of the property attached, setting up an

1. INTERVEN-
TION : gener-
al assignee :
attachment.

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equitable landlord's lien, and praying for an injunction to restrain the defendants from removing the goods attached in the actions. The plaintiffs filed a bill in chancery against all persons known to have an interest in the attached property, praying the appointment of a receiver and alleging that the mortgages are fraudulent and void. Upon the filing of this bill the court appointed a provisional receiver and fixed a day for hearing the application for the appointment of a receiver. On the same day defendants made a general assignment of their property to E. S. Taylor, who was not made a party to the chancery proceeding just mentioned, as the assignment was not known to the plaintiffs therein when their bill was filed. All of the separate actions we have mentioned were brought in the Circuit Court. On the day the application for the appointment of a receiver was set for hearing, all of the cases were taken upon a change of venue to the District Court upon the application of Greenbaum, Schroder & Co. Thereupon, all the cases, together with the proceedings in the assignment, were consolidated as one case, and the assignee, Taylor, was appointed receiver, with power to sell the goods in the usual course of business. Greenbaum, Schroder & Co. then filed answers in the actions in attachment, admitting the causes of action, but setting up counter-claims upon the attachment bonds for the wrongful suing out of the attachments. Subsequently Taylor, as assignee of Greenbaum, Schroder & Co., filed a petition of intervention in each of the attachment suits, claiming to recover upon the respective attachment bonds for the wrongful suing out of the writs, alleging that the respective claims upon the bonds were transferred to him by the general assignment. His claims for damages are the same as those set up in the counter-claims of Greenbaum, Schroder & Co. The plaintiffs in the attachment actions moved to strike the petition of intervention, on the ground that the intervenor is not entitled to the remedy which he attempts to pursue by intervention. The motion was overruled, and from this decision of the District

Dunham, Buckley & Co. v. Greenbaum, Schroder & Co.

Court plaintiffs appeal. The only question in the case involves an inquiry into the correctness of this decision.

The facts are intricate, and confusion naturally arises in the mind when an attempt is made to contemplate all in one view in order to determine the rights of the respective parties. If we first determine what rights the respective parties set up and what the law secures to each, the case becomes simple, and no confusion results on account of the conflicting claims of the several parties to the numerous suits consolidated as one. We will proceed in this manner to the consideration of the case.

II. The defendants in the attachment suits and the intervenor, allege that the attachments were wrongfully sued out and that defendants sustained great damage thereby. For such an injury the law gives the defendants a remedy which they may pursue by counter-claims in the respective attachment suits. The claims for damages are made, and, as at this stage of the proceedings no inquiry can be made into their rights to recover thereon, they must now be regarded as valid claims, and the rights of the parties must be considered as they would be regarded were it admitted that defendants are entitled to recover upon the claims in proper proceedings.

These claims in the hands of defendants are transferable under our statute, and it is conceded by counsel for plaintiffs, as we understand their arguments, that the claims passed to the assignee under the general assignment. This is the point of the case whereon its decision turns. Now, how may the assignee enforce these claims under the peculiar facts of the case, and what remedy shall he pursue?

The defendants, in their counter claims, insist that they are entitled to recover damages thereon. As we have seen, the claims are transferred to the assignee. It is very plain that if the claims in the hands of the assignee may be enforced in the attachment actions, thereby the plaintiffs' judgments will be wholly defeated, or reduced in part, or judgments for damages may be recovered against the plaintiffs; in either

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case the benefits ought to go to the estate held by the assignee. The assignee is entitled to the same rights and remedies for the enforcement of these claims as were held before the assignment by the defendants. He has an interest in the matters in litigation involving these claims, which is adverse to both plaintiffs and defendants. Under Code, section 2683, he has clearly a right to intervene in the action and set up the claims against plaintiffs. If the claims be established to any extent, the estate which he represents will be benefitted thereby. If there shall be judgments against plaintiffs for sums greater than the amounts of the debts of defendants, the estate will be entitled to the proceeds gained therefrom.

The defendants may not be entitled to recover upon the counter-claims for the reason that they were transferred by the assignment to the assignee. But the question involving their rights to recover thereon is involved in their counter-claims, which are prosecuted by them in the attachment suits. The assignee insists that the claims for damages were transferred to him by the general assignment. Questions may arise involving the rights of either plaintiffs or defendants to insist that their claims for damages and the debts of defendants should be set off, the one class of indebtedness against the other. But be this as it may, there can be no doubt that the assignee has an interest in the counter-claims. The statute above cited authorizes him to intervene in the actions to the end that this interest may be protected.

III. Counsel for plaintiffs argue that the assignee cannot be substituted in the actions so as to take the place of the defendants. This position is probably correct; but we do not discover that it has any bearings adverse to the assignee's right to intervene.

The counsel for plaintiffs admit that the assignee may prosecute an original suit to recover damages for the wrongful issuing of the writs of attachment. In such a suit they insist that the defendants thereon may plead counter-claims. This position may be admitted. But they further insist that

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if the assignee be permitted to intervene, the same parties against whom the action should be brought could set up no counter-claims against the intervenor's claim. It may be true that these parties could not plead a defense to the intervenor's claim in the form of a counter-claim. But it is very plain that they have the right to set up the same defenses to the intervenor's claim that they could have urged against the defendants, had no assignment been made. The defendants' claims for damages, had there been no assignment, could have been set up as counter-claims against plaintiffs' causes of action. One class of claims may be set up against another. It depends upon which party is the plaintiff, in order to determine that the claims set up shall be called counter-claims. The rights of the parties are not affected by the circumstances of their being plaintiffs or defendants, nor by the name given to the particular form of remedy which, on account of such circumstances, they may be required to pursue.

Counsel for plaintiffs speak of the assignee's claim made in his petition of intervention as a counter-claim, and insist that he cannot plead a counter-claim as a defense. We think the intervenor does not so plead his claim. The abstract, without reciting the pleading, shows that the petition of intervention alleges that the assignee has become entitled to recover the damages sustained by the wrongful issuing of the attachments, and asks judgment therefor. It is not stated that the damages are pleaded as a counter-claim.

We reach the conclusion that the District Court rightly overruled plaintiffs' motion to strike out the petition of intervention.

AFFIRMED.

Argall v. Pugh.

ARGALL ET AL. V. PUGH.

1. **Practice: CONTINUANCE: DILIGENCE.** An application for a continuance to procure testimony held to have been correctly overruled for want of a sufficient showing of diligence.
2. **Practice in the Supreme Court: TRIAL DE NOVO.** To authorize the trial *de novo* of an equity case by the Supreme Court all the evidence offered, as well as introduced, on the trial below must be before the court, and must have been certified by the judge at the trial term.
3. —: —. An equity case not triable *de novo* can be reviewed only on errors assigned, and as to questions raised in the trial court.

Appeal from Harrison Circuit Court.

MONDAY, JUNE 13.

ACTION in chancery to quiet the title to certain land. Appellant was, with others, made a defendant and the petition alleges that he claims some interest and title in and to the property adverse to the title of plaintiffs. The relief prayed for in the petition is that plaintiff's title be established and declared to be paramount to the claims of defendant; general relief is also sought in the petition. A decree was rendered for plaintiffs upon a trial on the merits; defendant appeals.

Smith & Clyde, for appellant.

Barnhart & Cadwell, for appellees.

BECK, J.—I. The petition was filed on the 9th day of February, 1880, and service by publication was made upon defendant. At the appearance term, in March following, defendant filed his answer denying that plaintiffs are the unqualified owners of the land, and averring that their grantee executed to defendant a mortgage thereon to secure a promissory note by him executed to defendant, which is due and remains unpaid and is still his property. It is shown that

 Argall v. Pugh.

the mortgage was duly recorded. Defendant alleges that whatever interest or estate the plaintiffs have in the land is subject to his mortgage, and asks that a decree be entered so declaring. The plaintiffs by a reply denied the allegations of defendant's answer. The court ordered the cause to be tried at the next term upon deposition, fixing the time within which each party should take proofs. About the expiration of the time wherein defendant was required to take depositions, he applied to the judge of the court at chambers for an extension thereof, which was refused upon the ground that the judge in vacation had no authority to extend the time. This action of the judge was not made the ground of an exception. It cannot, therefore, be reviewed upon this appeal.

II. At the next term the defendant's attorney made an application for a continuance on the ground of the absence of
 1. PRACTICE: the testimony of his client, which was, we think, continuance: diligence: correctly overruled. The application failed to show the exercise of due diligence to procure the testimony of the defendant. It is shown that he is a resident of California and that his attorney for more than two months before the term was in communication with him. Yet it is not shown that during the time any steps were taken to secure his testimony. Surely it cannot be denied that inaction for so long a time shows want of the diligence required by the law. The motion, in our opinion, was rightly overruled.

III. The plaintiff filed an amended abstract denying that the record of the court below shows that all the evidence
 2. PRACTICE offered upon the trial is preserved by proper certificate. We have held that to authorize a trial *de* in the supreme court: trial de novo. *novo* in this court the evidence offered, as well as that admitted, must be before us. *Taylor & Co. v. Kier*, 54 Iowa, 645.

The record before us shows that at the term following the one at which the case was tried the judge made and filed a certificate showing all the evidence offered and admitted.

Argall v. Pugh.

But this certificate was not made in time. We have held that a certificate made at the term next after the trial does not comply with the statute. *Cornell v. Cornell*, 54 Iowa, 366.

IV. The defendant insists that the petition should have been dismissed as to him, for the reason that an action to a — : —. quiet title cannot be maintained against one holding a mortgage lien upon the land. The question of law here presented we cannot decide, for the reason that it was not raised in the court below. No objection upon this ground was urged there; indeed the defendant in his answer seems to concede that the existence and validity of the mortgage was properly involved in the action, for in his answer he prays that it may be established as paramount to plaintiff's title. We cannot consider the objection for the reason that it was first made in this court. See *Schmeltz v. Schmeltz*, 52 Iowa, 512, and cases referred to therein.

V. For another reason we cannot consider this motion. While the case is not triable *de novo* here, it may be tried upon errors assigned. *Schmeltz v. Schmeltz*, *supra*. The defendant has assigned certain errors, but none of them cover this point. We cannot consider questions not raised by the assignment of errors. Code, § 3207; see, also, cases cited under this section in Miller's Code.

The foregoing decision disposes of all points and objections raised in the argument by defendant's counsel. We cannot disturb the decree of the court below. In view of the disposition we make of the case, it becomes unnecessary to pass upon a motion made by plaintiff to strike defendant's amended abstract.

AFFIRMED.

ASHLOCK V. SHERMAN ET AL.

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136 718

1. **Practice; KIND OF PROCEEDINGS: DEMURRER.** The fact that a petition to secure a modification of an order made in a probate proceeding is entitled in equity, is not ground for demurrer.
2. ———: **PROBATE COURT: POWERS OF.** The probate court has the power to modify orders previously made by it, on a proper showing therefor.

Appeal from Linn Circuit Court.

TUESDAY, JUNE 14.

It is averred in the petition that the plaintiff is the widow of James Ashlock, deceased, and that the defendants are his heirs and devisees under his will; that said will was admitted to probate in 1877, and that by the provisions thereof there was bequeathed to the plaintiff a proper allowance for her maintenance during her life; that in June, 1878, the proper application having been made therefor, the court made an order granting the plaintiff the sum of \$500 of the moneys belonging to said estate, "to be invested in the purchase of an annuity, properly secured by mortgage in equal security." That plaintiff finds it "very inconvenient, if not impracticable, to make an advantageous investment of said sum of \$500 in an annuity, and that defendants, without any reason therefor, claim to have a contingent interest in said money.

The prayer of the petition, which is entitled in equity, is that the order of the court may be so modified that plaintiff may have absolute control of the money allowed to her, and that an order be made declaring that said defendants have no contingent interest therein.

There was a demurrer to the petition, upon the ground that the Circuit Court, as a court of equity, has no jurisdiction to modify or change an order made by the Circuit Court as a court of probate; that the Circuit Court as a court of probate has exclusive jurisdiction of probate matters. There was also the further ground of demurrer that the facts stated

Ashlock v. Sherman.

in the petition do not entitle the plaintiff to the relief demanded.

The demurrer was overruled. The defendants refused to further plead, and a decree was entered in substantial accord with the prayer of the petition. Defendants appeal.

J. C. Davis, for appellants.

J. B. Young, for appellee.

ROTHBROOK, J.—I. The Circuit Court has exclusive jurisdiction of the probate of wills and the settlement of estates.

Code, § 2312. It also has general original jurisdiction in all civil cases. The subject-matter of this proceeding should have been entitled as in probate, and not as an original action in equity. It was a matter pertaining to the settlement of an estate, and the relief sought was a modification of an order in probate. But, by section 2519, it is provided that an error as to the kind of proceedings adopted in the action is waived by a failure to move for its correction at the proper time. An error in the kind of proceedings adopted is not ground for demurrer. The cause should be transferred to the proper docket on motion. *Conyngham v. Smith*, 16 Iowa, 471; *Traer v. Lytle*, 20 Id., 301.

II. It is urged that the facts stated in the petition do not entitle the plaintiff to the relief demanded. It seems to us that the Circuit Court, having all parties in interest before it, may modify probate orders upon proper showing being made therefor, and that the allegation of the inconvenience and impracticability of making an investment of the money in question in an annuity was sufficient cause for modifying the previous order of the court, so as to make the fund available for the purpose to which it was devoted under the will.

In our opinion the demurrer was properly overruled.

AFFIRMED.

 Diehl v. Miller.

DIEHL V. MILLER ET AL.

1. **Administrator: ORDER OF DISCHARGE: WHEN CONCLUSIVE.** Where a final order discharging administrators is based upon the receipts of distributees for the amounts found due them, respectively, on final accounting, and no application to set aside such order is made within three months, it becomes conclusive as to the distributees, although they are plaintiffs in an action pending at the time of settlement against the administrators and their bondsmen.

Appeal from Buchanan Circuit Court.

TUESDAY, JUNE 14.

THE plaintiff is the assignee of one Ingsby McKinny and Nancy Niedy, two of the four heirs of Elzy Wilson, deceased. As such assignee he is the owner of an undivided half of the estate. The defendants Miller and Wilson are administrators of the estate. The other defendants are their bondsmen. The plaintiff brings this action to recover of them the amount of distributive shares to which his assignors became entitled as heirs. There was a trial by the court, and a finding that the administrators had been finally discharged. Judgment was accordingly entered for the defendants. The plaintiff appeals.

James E. Jewell, for appellant.

Lake & Harmon, for appellees.

ADAMS, CH. J.—The entry of discharge was made on the 27th day of May, 1879, and is in these words: "Upon exam-

1. **ADMINIS-** ination of final report of E. Miller, administrator,
TRATOR: OR- and it appearing that notice of said final account
 der of dis-
 charge: when
 conclusive. has been given by publication, proof of which is
 filed herein, and it appearing that the estate has been fully
 settled, and all the property accounted for, the report is ap-
 proved, and the administrator discharged, and the sureties
 released and the estate closed."

Diehl v. Miller.

The finding in the case at bar was made, and judgment was rendered thereon, about nine months after the order of discharge was made and entered in the Probate Court. Section 2475 of the Code provides that "any person interested in the estate may attend upon the settlement of accounts by the executor and contest the same. Accounts settled in the absence of any person adversely interested and without notice to him may be opened within three months, upon his application." The court found that the order of discharge had not been impeached or set aside and that the same had become an adjudication; that the administrator had fully accounted and had discharged all the duties for which he or his sureties became bound.

It appears, however, that this action was brought against the administrators and their bondsmen before the order of discharge was made. The plaintiff claims that he is not, therefore, bound thereby.

That it was the duty of the administrators to file their report, notwithstanding the action against them and their bondsmen, there can be no doubt. That it was the duty of the court, sitting as a court of probate, to receive the report, make a final settlement, and upon all the property being accounted for to make an order of discharge, seems equally clear. Whether such order when made could be deemed to have any validity as against the plaintiff is the question which he presents for determination. In support of the proposition that it has not, he cites and relies upon *Clark v. Cress*, 20 Iowa, 50.

In respect to that case it may be said that it does not distinctly appear that there was a final settlement and discharge. But conceding that there was, and that the true rule is that a discharge, though fairly obtained and not opened within the time allowed, will not ordinarily protect the administrator against further proceedings in an action commenced upon his bond, yet it appears to us that the final settlement and order of discharge may be made under such circumstances

Diehl v. Miller.

that the plaintiff in an action upon the bond should be held to be concluded.

The abstract in the case before us does not purport to contain all the evidence. But from what evidence is set out we understand the facts to be that the plaintiff appeared in the Probate Court and contested the administrators' account for a while, but finally withdrew his opposition; that a certain amount was found due from the administrators, which they paid, and which was distributed. The plaintiff was at that time the assignee of Ingsby McKenny, and it appears to us that the evidence tends to show that he received, and receipted for, such an amount as was determined to be his assignor's distributive share. Nancy Niedy also, it appears to us, received and receipted for a certain amount. It is possible that we misinterpret this evidence. We do not care to go into a critical examination of it, for we do not base any determination upon it.

Every reasonable presumption is to be entertained in favor of the ruling below. If the order of discharge was based upon the receipts of the distributees or their assignee, given for the amount found due them respectively upon the final accounting, and no application was made to set aside the order of discharge within the time allowed, it appears to us that the persons so receipting must be deemed to have acquiesced in the final settlement and order of discharge, and to have become concluded thereby.

We are inclined to think that the facts supposed are true, but it is not necessary for us to demonstrate that they are proven. If the order of discharge might have been made under such circumstances as to conclude the plaintiff, we may presume, as we have not all the evidence before us, that it was made under such circumstances, and that it was so shown to the court below.

AFFIRMED.

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86 77
56 316
102 746
103 486

TUTTLE V. STORY COUNTY ET AL.

1. Practice in the Supreme Court: ABSTRACT: CERTIFICATE OF EVIDENCE. A certificate of the trial judge that the record in a case contained all the evidence "adduced" on the trial was held insufficient to authorize a trial *de novo*, on appeal, where the abstract showed that evidence offered and rejected was not contained therein.

Appeal from Story District Court.

TUESDAY, JUNE 14.

J. B. RANDALL constructed a court house for the defendant, Story County, for the agreed price of \$39,500. The plaintiff furnished stone window caps for this building, under a contract with Randall. On the 22d day of November, 1876, there was due plaintiff from Randall on said contract \$500. On that day Randall executed and delivered to plaintiff a paper of which a copy is as follows:

"OFFICE OF J. B. RANDALL, }
CONTRACTOR AND BUILDER,
OMAHA, NEB., NOV. 22d, 1876. }

"J. R. HAYS, Esq., *Auditor Story County*: Please retain from amount due me on final settlement of court house contract the sum of \$500, and pay the same to the order of Martin Tuttle. Very respectfully.

"J. B. RANDALL, contractor and builder."

THIS action is brought in equity, upon this paper, against the defendant, Story county. It is claimed that it operated as an equitable assignment to the plaintiff of \$500 of the sum due the plaintiff from the county. The court found for the plaintiff. The defendant, Story county, appeals.

F. D. Thompson, for the appellant.

John H. Drabelle, for the appellee.

DAY, J. The action is an equitable one, and is presented here, without assignment of errors, for trial *de novo*. The appellee insists that the judgment must be affirmed because the certificate of the trial judge does not show that the record contains all the evidence offered at the trial. The certificate of the judge is as follows: "I hereby certify that the above and foregoing with the exhibits therein referred to is all the evidence, objections, rulings of the court and exceptions thereto adduced on the trial of the above entitled cause."

In *Taylor & Co. v. Kier*, 54 Iowa, 645, it was held that a certificate of the judge to the testimony that it constituted all the evidence *introduced* was not a compliance with section 2742, Miller's Code, and did not authorize a review of the case. In the certificate now in question the word *adduced* is employed. Adduce means to bring forward, present, offer or introduce. Now whilst one of the meanings of the word adduce is the same as the word employed in the statute, another of its meanings is the same as the word held insufficient in *Taylor & Co. v. Kier*. The word adduced may mean either offered or introduced. But the abstract of the appellant shows that in several instances evidence was offered which was excluded, and is not shown in the abstract. The abstract itself, therefore, contains internal evidence that the certificate of the judge could not have used the word adduced in the sense of offered. The case is not in a condition to be tried *de novo*, and it must, therefore, be

AFFIRMED.

 Proska v. McCormick.

PROSKA V. MCCORMICK.

1. **Action: TIME OF COMMENCEMENT: SERVICE OF NOTICE.** It is only for the purposes of the statute of limitations that the delivery of an original notice to the sheriff for service constitutes the commencement of an action; for all other purposes the commencement of the action dates from the actual service of the notice.

Appeal from Chickasaw Circuit Court.

TUESDAY, JUNE 14.

THIS action was brought upon a written instrument of which the following is a copy:

“SEPTEMBER 8TH, 1879.

“We are hereby bound in the penal sum of \$270.00 to make John Proska's McCormick Binder do good work at any time he will give our agent notice during the harvest of 1880. The aforesaid sum to be paid by refunding to the said Proska his promissory notes for that amount, made by him to us this day. In consideration of said refunding he is to return to us the said binder, and if suit be not begun on this contract by October 1st., 1880, its conditions are thereby acknowledged fulfilled.

C. H. & L. J. MCCORMICK,
per J. F. WOOLSEY.”

It is averred in the petition that the machine did not work well, and that the defendants' agent, upon notice given, undertook to make it do good work, and failed to do so, and that by reason of such failure the plaintiff tendered the machine to the defendants, and demanded his notes, which they refused to deliver to him. Judgment was demanded for \$270 and costs.

Among other defenses, the defendants averred that by the terms of said contract it was provided that if suit was not brought thereon by October 1, 1880, the contract was to be regarded as fulfilled, and that no notice of the bringing of the action was served upon defendants until October 8, 1880.

56	318
103	223
56	318
111	598
56	318
121	681
121	682
121	685
121	689
121	698
56	318
136	152

There was a trial by jury. Pending the trial, it was stipulated by the parties that the original notice in the cause was placed in the hands of the sheriff for service on the 27th day of September, 1880, and that it was served on the 8th day of October, 1880. The court thereupon took said cause from the jury, and rendered a judgment against the plaintiff for costs. Plaintiff appeals.

W. J. Springer, for appellant.

Potter & Ronayne, for appellees.

ROTHROCK, J.—The sole question presented by this appeal is, was the suit begun by the first of October, 1880.

Counsel for appellant relies upon Code, section 2532, which is as follows: "The delivery of the original notice to the sher-

1. ACTION: iff of the proper county, with intent that it be
time of com- served immediately, which intent shall be pre-
mencement: sumed, unless the contrary appears, or the actual
service of no- service of the notice by another person, is a commencement
tice. of the action."

This section of the statute is found in the chapter on the limitation of actions, and in *Parkyn v. Travis*, 50 Iowa, 436, we held that the time thus fixed as the commencement of an action had reference merely to the rights of the parties under the statute of limitations, and that section 2599 contains the general provision as to what is the commencement of an action. That section provides that "actions shall be commenced by serving the defendant with a notice signed by the plaintiff or his attorney, etc." It appears to us that the ruling in that case is conclusive of the question presented in this, and that the action was not commenced within the time named in the contract.

Counsel further relies upon *Pitkin v. Boyd*, 4 G. Greene, 255; *Nuckols v. Mitchell*, Id., 432; and *Elliott v. Stevens & Co.*, 10 Iowa, 418. These were all attachment suits, and the writs of attachment were levied before, or simultaneously with,

 Cameron v. The City of Burlington.

the service of the original notice. It was held that the writs should not be dissolved, because the attachments were not prematurely levied, under section 1846 of the Code of 1851, which provided for an attachment at the commencement of the action. The question as to what was the commencement of a purely personal action was not presented in those cases, nor does it appear that any statute like section 2599 of the Code was under consideration. In attachment proceedings, the filing of the petition authorizes the issuance of the writ. It does not depend upon the service of the original notice, and it may well be said that where the petition has been filed the writ issues at the commencement of the action.

We think this action was not commenced by October 1, 1880, and that the time thus fixed in the contract was a stipulation as to what should be conclusive evidence that its conditions had been performed.

AFFIRMED.

CAMERON V. THE CITY OF BURLINGTON.

1. **Taxation: SITUS OF PROPERTY: PERSONALTY IN HANDS OF ADMINISTRATOR.** Where the administrator of an estate, having personal property thereof in his possession, resides in the same county in which his decedent died, but in a different township, such property is taxable in the township of his residence.

Appeal from Des Moines Circuit Court.

TUESDAY, JUNE 14.

The plaintiff appeals from an order of the Circuit Court refusing to cancel a certain assessment made by the assessor of the city of Burlington, Des Moines county. The plaintiff claims that the property is non-assessable in the city of Burlington. The property consists of promissory notes and belongs to the estate of one John Sunderland, deceased. The

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104	643
105	571

plaintiff is administrator upon his estate. Sunderland was a resident of the city of Burlington and died intestate in that city. Letters of administration were issued from the Circuit Court of Des Moines county. The plaintiff, the administrator, resides in Union township in that county, and has the notes in his possession. They have been assessed both in Union township and the city of Burlington. The plaintiff made an application to the city council of Burlington, sitting as a board of equalization, to cancel the assessment. This the council refused to do, and the plaintiff appealed to the Circuit Court, which also refused to cancel the assessment. The plaintiff now appeals to this court.

Hall & Huston, for appellant.

C. L. Poor, for appellee.

ADAMS, CH. J. As the notes were not assessable in both places we have to determine in which they were assessable.

It is not claimed, nor could it properly be, that Burlington has any superior rights by reason of the fact that it is an incorporated city. The case, then, is not different from what it would have been if Sunderland had died elsewhere in the county, but not in Union township. We have, then, the question as to whether the fact that a person dies in a given township, leaving personal property, gives the assessor of such township the right to assess the property, regardless of the place where the property is owned or situated. Those who contend that it does must maintain that a rule is applicable different from that which applies to any other personal property.

The statutory provisions touching the question at issue are as follows. The personal property of a decedent is to be listed by the executor. Code, § 803. The assessor of each township shall list every person in the township, and shall assess all the real and personal property therein. Code, § 823. This would seem to be broad enough to include

Cameron v. The City of Burlington.

personal property in the township held by an executor residing in the township. But if there was any doubt about it such doubt would be removed by another provision in the same section. "Any person who shall refuse to assist in making out a list of his property *or of any property which he is by law required to assist in listing* * * * shall forfeit the sum of one hundred dollars." The "property which he is required by law to assist in listing," as distinguished from his own, includes personal property which he holds in a fiduciary capacity as executor or trustee. It seems clear to us that the statute was designed to provide that the assessor of each township may demand of every executor residing in the township a list of the personal property held by him as executor in the township, under penalty of a fine. To say that this is not so except when the deceased died in the township is to impose a qualification upon the statute, by judicial construction, for which we find no warrant.

It is manifest that the important consideration is not so much the comparative rights of the different townships as the certainty that all property shall be taxed once, and only once. To secure this certainty, we must presume, was the object of the statute. But this cannot be secured under the rule contended for by the appellees, unless assessors are to be sent into foreign townships in search of taxpayers and property. If this were the design of the statute it appears to us that a township assessor's duties would be co-extensive in some sense with the county, if not the State.

We are aware that in *McGregor's executors v. Vanpel*, 24 Iowa, 436, it was held that the personal property of an estate of a decedent is to be assessed in the county where the decedent died, although the residence of the executor and actual situs of the property may be elsewhere. It must be conceded, we think, that it is not easy to make a broad distinction upon principle between that case and this; yet we are not prepared to say that the principle is the same. The ruling in that case was placed upon the ground that the executor is the

representative of the decedent. As letters of administration under the Revision issued in the county where the decedent died if he died a resident of the State, and as the administration was had in such county, it was doubtless thought that the representation of the decedent by the executor should be regarded as in such county, and that as a consequence the personal property should be regarded as having a constructive situs in the county, even though the actual situs should be elsewhere.

In the case at bar it is not denied that the property should be assessed in the county where the administration is, because both the administrator and property are in such county. But when we are asked to hold that the property is assessable in a township in which is neither the administrator nor property we are asked to extend the idea of local representation beyond that of local administration, that is, we are asked to apply local representation to the township while local administration, at most, concerns only the county.

The writer of this opinion does not wish to be understood as expressing an approval of the decision in *McGregor's executors v. Vangel*, but he thinks that if it should be conceded that the decision is wrong the facts in the present case are not such as would justify us in overruling it; and he is authorized to say that Mr. Justice Day concurs in this remark.

Our attention is called by the appellees to *Stevens v. Mayor of Booneville*, 34 Mo., 323, in which it was held that personal property of an estate is to be assessed where the decedent died, although the residence of the executor and actual situs of the property might be in a different township.

But the case before us must turn upon the construction which should be placed upon the provisions of our own statute. As the proper construction admits in our mind of no reasonable doubt, we have to say that we think that the property in question was assessable in Union township and not in the city of Burlington.

REVERSED.

HOLBROOK & BRO. v. OBERNE, MCDANIEL & CO. ET AL.

1. **Partnership: REQUISITES OF: SHARING IN LOSSES.** One who receives a share of the profits of a business in payment for his services in managing the same, but does not share in the losses, is not a partner therein.
2. **Agency: PROOF OF COURSE OF DEALING.** Evidence considered and held insufficient to establish such a course of dealing as would justify a third person in presuming that an employe had authority to sell property of his employers and receive payment for the same.

Appeal from Pottawattamie District Court.

TUESDAY, JUNE 14.

ACTION AT LAW. Trial to the court, judgment for the plaintiffs, and defendants appeal.

Phillips, Goode & Phillips, for appellants.

Monk & Selleck, for appellees.

SEEVERS, J. The contention of the parties may be thus stated: The plaintiffs were the owners of a tannery and claim to have employed one Horning to manage and operate the same for them; that certain hides were purchased to be manufactured into leather at said tannery, and that Horning without the knowledge or consent of the plaintiffs sold said hides to the defendants, and this action was brought to recover the value thereof.

The defendants paid Horning for the hides and claim they were justified in doing so because Horning was a partner of plaintiffs in said business, or, if this be not so, Horning was the general agent of the plaintiffs, and that defendants were fully warranted from the acts and conduct of the plaintiffs in believing Horning had authority to sell the hides and receive the proceeds. As to these questions we have to say:

I. As to the partnership. There was not in fact any

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96 540
96 730
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 Holbrook & Bro. v. Oberne, McDaniel & Co.

contract of partnership entered into between the plaintiffs and Horning. The plaintiffs were unacquainted with the tanning business. Horning was, and he was employed by plaintiffs to manage the business, the agreement being that he was to receive for his services twenty-five dollars per month and one-half the profits, but he was not to share in the losses.

We think the court below rightly held this did not make Horning a partner in the business with the plaintiffs. At most Horning was an employe, and was to receive a share of the profits as a part of his compensation for conducting the business. Such a person is not a partner. *Bradley v. White et al.*, 10 Met., 303; Collyer on Partnership, § 34 and authorities cited.

II. The evidence satisfactorily shows Horning was the general agent of the plaintiffs to purchase hides, superintend the manufacture of the same into leather, and to generally manage the tanning business, but the evidence fails to show Horning had any authority to sell hides after the same had been purchased for use at the tannery, except that he sold a lot of hides to a branch house of the defendants at Sioux City. Such sale was made with the knowledge and consent of the plaintiffs. Horning also sold another small lot of hides, about which the plaintiffs had no knowledge except there is an entry on their books so showing. With the knowledge of the plaintiffs, Horning exchanged some leather for wood to be used in the tannery. The foregoing are the only sales of hides or leather that were made by Horning, who entered the employment of the plaintiffs in July, 1878, and the hides in question were sold to the defendants in July, 1879.

The general mode of doing the business was for Horning to purchase hides, and when the same were manufactured into leather ship the same to a commission house in Chicago for sale on account of the plaintiffs. Such being the material facts we cannot say the court erred in holding the plaintiffs

1. PARTNER-
SHIP: requi-
sites of: shar-
ing in losses.

2. AGENCY:
proof of:
course of
dealing.

 Rollins v. Proctor.

had not held Horning out to the world as having authority to sell hides and receive the proceeds thereof. No such general course of dealing has been established as to warrant the opposite conclusion. At most there were only three transactions of that character within a year, and we are unable to say the defendants had knowledge at the time they made the purchase of more than one of them, if that. So far as the defendants are concerned we are unable to find that plaintiffs did more than place Horning in charge of the establishment and permit him to make the sale to the Sioux City purchaser. We do not think this should be held sufficient to deprive the plaintiffs of property which undoubtedly belonged to them, and which was shipped by Horning from the tannery to Council Bluffs and there sold.

AFFIRMED.

ROLLINS V. PROCTOR ET AL.

1. **Landlord and Tenant: LIEN FOR RENT: PRIORITY OF LIENS.** Where during the term of a lease another was executed between the same parties and covering the same property, it was held that, while the execution of the second lease operated as a cancellation of the first, as between the parties, the lien of the landlord for rent under the second, upon property kept on the premises at the time of the change, would not be postponed by reason thereof to that of a chattel mortgage executed by the lessee prior to such change, and of which the lessor had no knowledge at the time.
2. —: —: **WAIVER OF.** The right to a landlord's lien for rent is not waived by the taking of personal security for the performance of the covenants of a lease, unless such is the intention of the parties.

Appeal from Polk Circuit Court.

TUESDAY, JUNE 14.

ON the 14th day of November, 1880, the plaintiff commenced this action in equity for the reformation of a lease of

56	326
94	107
56	326
103	680
56	326
4112	690

Rollins v. Proctor.

certain premises, for the recovery of rent thereon from December 1879 to November 1880, at the rate of \$54.15 per month, and for the issuance and enforcement of a landlord's attachment against certain property used upon the leased premises. The defendants made no defense. Hugh R. Creighton intervened and claimed a lien upon the attached property, in virtue of two chattel mortgages thereon, superior to the landlords's lien of the plaintiff.

The court rendered judgment for the plaintiff for \$714.05, and ordered that the proceeds of the attached and mortgaged property be applied thereon, and dismissed the intervenor's petition. The intervenor appeals. The material facts are stated in the opinion.

Charles A. Finkbine and E. McClain, for appellant.

W. O. Curtiss and Nourse & Kauffman, for plaintiff.

DAY, J.—In October, 1877, the plaintiff leased a livery barn, the premises involved in this controversy, to L. Wells, for a period of five years, at a monthly rental of \$54.15. In July, 1878, Wells sold his livery stock to Blyler & Skinner, they assuming the unexpired term of said lease. Plaintiff accepted them as tenants in lieu of Wells. Skinner sold his interest in the stock and lease to the defendant Proctor. Proctor sold to Mrs. Barrett, and in December 1878, Blyler and Mrs. Barrett made a division of stock, so that, instead of each owning an undivided half, each owned one half in severalty. After said stock had been so divided, December 31, 1878, Mrs. Barrett's livery stock in the stable was purchased by the defendant Proctor. Blyler and Proctor thus became occupants of the premises, and tenants of plaintiff in virtue of the lease which she had made to Wells two years before. Blyler and Proctor were not partners. Each owned a livery stock. Both stocks were in the same livery barn, and both proprietors were occupying the premises by virtue of the lease executed to Wells in 1877, and expiring in 1882.

Rollins v. Proctor.

Each of the proprietors of these two livery stocks made propositions to the plaintiff for a lease of the premises. Proctor's proposition was accepted and a written lease of the premises was executed to him. This lease bears date December 31, 1878, and is executed by H. R. Proctor and D. H. Young. The evidence shows that D. H. Young was not a lessee of the premises, but that he signed it simply as a surety or guarantor of the defendant Proctor. Although the lease bears date December 31, 1878, yet it appears from the evidence that, whilst it was signed on that day by Proctor and Young, and placed in the possession of the plaintiff, it was not signed and accepted by the plaintiff until several days thereafter, the exact date of such signing and acceptance not being ascertainable from the testimony. Blyler surrendered possession and vacated the premises March 1, 1879, having paid rent to plaintiff up to that time. The lease to the defendant provided for a monthly rent of \$60 per month, but subsequently it was so far modified as to reduce the rent to \$54.15 per month, being the same rent as that provided for in the lease to Wells. On the 31st day of December, 1878, the day that his lease bears date, the defendant Howell R. Proctor executed to the intervenor his note for \$600, payable six months after date. On the same day, to secure this note, the defendant executed to the intervenor a chattel mortgage upon his stock in the livery barn in question, being the property upon which the plaintiff claims a landlord's lien, and upon his interest in the lease of the stable. This mortgage was filed for record on the 6th day of January, 1879.

On the 5th day of March, 1879, the defendant Proctor executed to the intervenor a note for \$350, payable November 5th, after date. On the same day, to secure this note, he executed a chattel mortgage upon a portion of his stock in the livery barn in question, being property upon which the plaintiff claims a landlord's lien. This mortgage was filed for record February 14th, 1880.

Bollins v. Proctor.

I. It is urged by the appellant that the acceptance of the new lease by the defendant, covering the unexpired term of the old lease, operates as a surrender of the old lease, and that as the new lease was not executed by the plaintiff until after the mortgage to intervenor was executed, the lien of the mortgagee is paramount to the lien of the landlord. It may be conceded that, as between the landlord and tenant, the execution of a new lease for the unexpired term of a former lease operates as a surrender and extinguishment of the old lease, so that the respective rights of the parties thereto will be governed by the new lease. To this effect are the authorities cited by appellant. But no principle of law or of equity requires that the surrender shall be regarded so complete and absolute as to allow the lien of a mortgage to attach intermediate the surrender of the old and the taking effect of the new lease. At the time the mortgage to the intervenor was executed the defendant was in possession of the premises under a lease running until October, 1882, and covering the period for which rent is now claimed. There can be no question that when the mortgage was executed it was accepted by the intervenor subject to the right of the plaintiff to enforce a landlord's lien for the rent accruing during this term. The intervenor is in no way prejudiced by the execution of the new lease, for the period for which rent is claimed is covered by the old, and the monthly rental sought to be recovered is the same. The plaintiff testifies that at the time she made the lease to Proctor she had no knowledge of the existence of a chattel mortgage to Creighton, and that she first learned of it about the time suit was commenced. If plaintiff had held a mortgage upon the property, and had surrendered and canceled it and taken a new one, in ignorance of an intermediate mortgage to intervenor, equity would restore her to her rights under the first mortgage. Now, it is true the plaintiff does not seek to recover under the first lease, but she shows a state of facts under which it would be exceedingly inequitable to permit

1. LANDLORD
and tenant :
lien for rent :
priority of
liens.

Rollins v. Proctor.

the intervenor's mortgage to take precedence. We know of no legal principle which requires us to sanction so inequitable a result.

II. It is claimed that by accepting Young as a surety or guarantor upon the lease the plaintiff waived the right to insist upon a landlord's lien. We need not determine whether the principle of waiver of a vendor's lien by the acceptance of personal security applies to the lien of a landlord. For an authority holding that the principle of such waiver does not apply to a landlord's lien, see *Smith v. Wills*, 4 Bush (Ky.), 92.

The taking of personal security merely raises a presumption of the waiver of a vendor's lien, which presumption may be rebutted by proof. See *Kendrick v. Eggleston*, ante, 128, and authorities cited. The plaintiff testifies as follows: "I knew I had a landlord's lien upon all there was in the stable, and it would make it still stronger by Mr. Young's signature. I relied upon that security, and it was his proposition to give Mr. Young as further security." This evidence clearly shows that it was not the intention to waive the landlord's lien, and rebuts whatever presumption of waiver arises from the acceptance of the signature of Young.

The court did not err in dismissing intervenor's petition.

AFFIRMED.

CHAMBERLAIN V. CLAYTON ET AL.

- 1 **Public Officers: LIABILITY FOR OFFICIAL ACTS.** The trustees of a public institution, who are charged by the statute with its general supervision, and required to perform all acts necessary to render it efficient, are not personally liable in damages for the cancellation of a contract of employment made by them, and a refusal to allow the employe to enter upon his duties thereunder, though such action upon their part is wrongful, unjust, and illegal.

Appeal from Pottawattamie District Court.

TUESDAY, JUNE 14.

THE petition in this case contains three counts. In the first count is averred in substance that on the 12th day of August, 1880, the State of Iowa made a verbal contract with the plaintiff, by which the plaintiff was employed as superintendent of the Iowa Institution for the Deaf and Dumb, for one year from September 1, 1880, at a salary of \$1,000, and board and lodging during that time for himself and family. "That the defendants, knowing the premises, and contriving and maliciously intending to injure and aggrieve the plaintiff, and to injure him in his profession of a superintendent of schools, and to prevent him from acquiring any success, reputation, gain, or profit therein, and to oppress and vex him, before the first of September, 1880, wrongfully, wickedly, and maliciously did conspire, combine, confederate and agree together to prevent the plaintiff from entering upon the performance of, and from discharging the duties of, his office of superintendent under the said contract with the State of Iowa, and from entering into possession of his said office, and its emoluments." That plaintiff, on said first of September, 1880, went to said institution and offered to enter upon the performance of his said contract, but the defendants, in pursuance of said malicious conspiracy, did, by words, acts, orders, and threats, prevent the plaintiff from entering upon the discharge

Chamberlain v. Clayton.

of his duties under said contract, and have ever since so prevented him from performing his duties as superintendent of said institution.

The second count is, in substance, the same as the first, excepting that the acts of the defendants are charged to be unjust, illegal, and wrongful. The allegation of a willful and malicious conspiracy is omitted.

In the third count it is alleged that the defendants were, and are, trustees of said institution, and that it was their duty, arising from their said office and from said contract, to allow the plaintiff to enter upon the performance of his said engagement; but that they, in violation of their duty, wrongfully, unjustly and illegally hindered, obstructed and prevented, and still do hinder, obstruct and prevent, the plaintiff from performing his said duties under said contract. A personal judgment is asked against the defendants for \$5,000 damages.

There was a demurrer to the petition, which was overruled as to the first and second counts, and sustained as to the third count. From the ruling in sustaining the demurrer as to the third count, the plaintiff appeals.

N. M. Pusey, for appellant.

Wright & Baldwin, for appellee.

ROTHROCK, J.—It will be observed that it does not appear from the allegations of the first and second counts that the defendants are trustees of the Institution for the Deaf and Dumb. For aught that appears therefrom, the defendants were mere strangers, and under the first count were guilty of a wicked and malicious conspiracy by which they prevented the plaintiff from performing his contract; and in the second count it is alleged they wrongfully, unjustly, and illegally hindered the plaintiff from entering upon the duties of his employment under his contract. The District Court held that these counts each

1. PUBLIC officer: liability for official act.

presented a good cause of action. In the third count, however, it is averred that the defendants were trustees of the institution, and that they, as trustees, neglected and refused to perform their duty, by wrongfully, unjustly, and illegally preventing the plaintiff from performing his contract. Section 1686 of the Code provides that the Trustees of the Institution for the Deaf and Dumb "shall have the general supervision of the Institution, adopt rules for the government thereof, provide teachers, servants, and necessities for the Institution, and perform all other acts necessary to render it efficient, and to carry out the purposes of its establishment."

We have, then, the question whether the trustees are liable to a personal action for damages at the suit of a teacher or superintendent whom they have employed, for wrongfully, unjustly, and illegally refusing to allow him to enter upon the employment? The demurrer to the petition raises this question, which we are called upon by the record before us to determine. It is not averred in the third count of the petition that the defendants acted corruptly nor maliciously. For aught that is averred therein they may have been performing what they honestly believed to have been an official duty, and still their act may have been wrongful, unjust and illegal as to the plaintiff.

Much of the argument of counsel is devoted to a discussion of the question as to whether or not the act of defendants in preventing the plaintiff from entering upon the employment was of a judicial or ministerial character. Counsel for appellant contends that if it be conceded that the making of the contract of employment was of a *quasi* judicial character, it cannot be claimed that the subsequent act of dismissal, or rather refusal to allow the plaintiff to enter upon the employment, was any other than purely ministerial. That the duty of employing teachers requires such judgment and discretion as to call into exercise functions to say the least *quasi* judicial, as defined in the reported cases on that question, we think can admit of no doubt. If so, all the authorities agree that

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there can be no personal liability of the officer unless the act complained of be willful, corrupt or malicious, or without the jurisdiction of the officer. *Wasson v. Mitchell*, 18 Iowa, 153; *Muscatine West. R. R. Co. v. Horton*, 38 Id., 33.

Whether there be such liability as against an officer exercising *quasi* judicial functions, even where he acts corruptly or maliciously, we need not determine in this case. We have recently held that a purely judicial officer is not liable to a civil action for a judicial act, even though it be alleged that the act complained of was corrupt, fraudulent, or malicious. *Jones v. Brown*, 54 Iowa, 74; and see *Henke v. McCord*, 55 Iowa, 378.

We are next to inquire whether the act of discharging the plaintiff, or, what we regard as the same thing, canceling the contract with him before he commenced the superintendency, was a ministerial act. The statute above quoted gives the general supervision of the institution to the trustees, and they are charged with the duty of performing all acts necessary to render the institution efficient. They owe a duty to the State and the public, as well as to the employes under their charge. If in the honest exercise of their discretion and judgment they should discharge an employe, they cannot be held liable to a civil action, because the act is not of a purely ministerial character, like the issuance of an execution by a justice of the peace, or the levy of a writ by a sheriff, or the like. If they may discharge an employe after entering upon the employment, they may also cancel a contract with one not yet having commenced to labor for the institution, upon grounds which may appear to them to be satisfactory. The same judgment and discretion, and power to determine, are required to be exercised in one case as in the other.

Without further extending the discussion, our conclusion is that the District Court did not err in sustaining the demurrer to the third count in the petition.

AFFIRMED.

THE STATE V. NEWCOMB.

56	335
100	230

1. **Practice in the Supreme Court: BILL OF EXCEPTIONS: TIME FOR SIGNING.** In criminal as well as civil actions the evidence must be preserved by bill of exceptions, or certificate of the trial judge, made at the trial term or within the time then fixed therefor by the court, and a judge's certificate or bill of exceptions signed after the expiration of such time will not be considered by the Supreme Court.

Appeal from Story District Court.

TUESDAY, JUNE 14.

THE defendant was convicted of obtaining the signature of another to a written instrument by false pretenses, and appeals to this court. The facts of the case involved in the points ruled by the District Court appear in the opinion.

S. F. Balliet, for appellant.

S. McPherson, Attorney General, for the State.

BECK, J.—I. At the last December term of this court, the evidence found in the transcript and abstract was stricken out, for the reason that it was not made a part of the record, by bill of exception or certificate of the judge. At the next term at Council Bluffs defendant moved the court to reinstate the evidence, upon the ground that a certificate of the judge trying the case had been procured since the cause was docketed in this court. This motion first requires our attention.

1. PRACTICE
in the su-
preme court:
bill of excep-
tions: time
for signing.

II. The cause was tried and judgment rendered against defendant, February 16, 1880, and the time for filing a bill of exceptions was extended for sixty days. No bill of exceptions was ever filed, and before the cause was brought to this court the evidence was not certified or identified in any manner, but during, or after, the December term, a certificate of the judge trying the cause was filed in this court, intended to show that all the evidence is set out in the transcript and abstract. This certificate was dated December 16, 1880.

The State v. Newcomb.

It may be conceded that the certificate of the judge trying a case, sufficiently setting out or identifying the testimony, will take the place of a bill of exceptions for the purpose of making the evidence a part of the record. Code, §§ 2832, 4481, 4482; *The State v. Fay*, 43 Iowa, 651.

The bill of exceptions, or certificate taking its place, must be made at the time of the trial, or at such time as the court may fix. Code, §§ 4483, 4484, 4485, 4486. In this case the certificate was not made within sixty days, the time prescribed by the order of the court. It cannot surely be claimed that the order may be disregarded, and the certificate or bill of exceptions may be signed at any time. Such a practice, if sanctioned by this court, would lead to the greatest uncertainty as to the substance of records, and to serious abuses. The judges trying causes are required to make up the record at a time when all the transactions of the trial and evidence introduced are fresh in the mind. Unless the time be extended, bills of exceptions must be signed at the term of trial. It is presumed that the judge, knowing that there will be a future day fixed by his order when he will be called upon to sign a bill of exceptions, would retain in his memory, aided by memoranda or the like, the facts of the case. If he be called upon longer after the time fixed for settling the bill of exceptions, he might be unprepared, by failure of memory, to state the facts with correctness. In the case before us, seven months elapsed after the time fixed for settling the bill of exceptions. We cannot think that, in all cases, the facts of the trial may be retained so long a time in the memory with confidence in its accuracy. But, if we sanction a bill of exceptions settled seven months after the trial, or after the day fixed for its settlement, what shall be the limit of the time in which the record may be made by the judge? There could be none.

III. The statute prescribing the time of making bills of exceptions in civil cases is similar to the provisions of the Code applicable to criminal cases. We have repeatedly ruled that a bill of exceptions made after the term prescribed by

Farley v. The C., R. I. & P. R. Co.

law, or the order of the court below, will not be regarded in this court. *Parmenter v. Elliott*, 45 Iowa, 317; *Frost v. Senior*, 44 Id., 706; *St. John v. Wallace*, 25 Id., 21; *Lynch v. Kennedy*, 42 Id., 220; *Lloyd v. Beadle*, 43 Id., 659.

The record before us, after the evidence is stricken out, presents no ground for disturbing the judgment of the court below. We have given it proper consideration. The instructions appear to be correct statements of legal propositions. Counsel for defendant complains of them only on the ground that they are not applicable to the evidence. As the testimony is not before us, it is impossible for us to consider this objection. The judgement of the District Court is **AFFIRMED.**

FARLEY V. THE C., R. I. & P. R. Co.

56	337
99	741

1. **Negligence: RAILROADS: RUNNING OF TRAIN.** Where a caboose and two cars, a half mile or more from the point where they became detached from the remainder of the train, ran over and killed the plaintiff's intestate, it was held that the conductor and brakeman, who were in the cupola of the caboose, were negligent in not sooner discovering the fact that they were detached, and in not being upon the tops of the cars where they could control their motions, and give warning of danger.
2. —: —: **CONTRIBUTORY NEGLIGENCE.** An employe of a railroad, whose duty required him to go a distance of about four hundred feet along the line of the track, and across the same, after waiting until a train had passed stepped upon the track behind it, walking in the same direction it was moving, and was run over and killed by cars which had become detached and were following the train: *Held*, that he was not guilty of contributory negligence. *SEEVERS, J., dissenting*, holds that whether or not the deceased was rightfully on the track in the performance of his duty was a question for the jury.
3. —: —. The verdict in an action to recover for the negligent killing of the plaintiff's intestate on the defendant's railroad held authorized by the evidence and instructions given. *SEEVERS, J., dissenting*.

Appeal from Polk District Court.

TUESDAY, JUNE 14.

THE plaintiff is the administrator of the estate of John Farley, deceased, his son, who, being in the employment of de-
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defendant as a section hand, was killed by cars running over him while walking upon defendant's railroad track. This action is brought to recover for the injuries which resulted in his death. There was a verdict and judgment for plaintiff. Defendant appeals.

Wright, Gatch & Wright, for appellant.

Nourse, Kauffman & Jackson and *D. Donovan*, for appellee.

BECK, J.—I. It is insisted by defendant's counsel, 1. That the testimony fails to show negligence on the part of defendant's employes operating the cars which caused the death of the intestate; 2. That the evidence shows want of care on the part of the deceased, which contributed to the injury. A motion for a new trial based upon these grounds was overruled.

The evidence before us establishes the following facts connected with the injury; The intestate was employed, as a section hand, with others, in repairing the track of defendant's road, at a point about one half mile east from the section house. About noon a freight train was due from the west. Between the point where the men were at work and the section house was a "cut", and a curve therein, which prevented the men seeing the approaching train from the west. The men were at work at the east end of the "cut." The foreman sent the intestate west to watch for the approach of the train. He went on the south side of the railroad upon the bank, which was five or six feet high, to await the coming train. This point was about 400 feet from the place at which he had left the other section hands. Upon discovering the train, or at a proper time thereafter, he signaled the men, who thereupon removed the hand-car to the north side of the track and took a position on the same side. Soon after the signal, and before the train had come up, he came down from the bank to the side of the track and stood there until the train passed him.

1. NEGLIGENCE: rail-roads; running of trains.

He then stepped upon the track, immediately after the last car had passed, and walked towards the other men and the hand-car. The train had separated nearly half a mile west of this point; two or three cars, probably two freight cars and the caboose, were from 90 to 120 feet behind the other cars of the train, all running at the rate of fifteen or twenty miles per hour. The deceased went upon the track between these two sections of the train, and had walked, some of the witnesses say ran, but a short distance when the separated cars struck him and ran over him, causing instant death. There was no brakeman or other persons upon the top of either of the separated cars, the conductor and brakeman being in the cupola of the caboose, and no effort was made to check the speed of the separated cars until about the time they had struck deceased. No one upon the train saw him while he was walking upon the track. The grade was "down" in the direction the train was running. Upon the evidence, we think the jury were authorized to find that the employes of defendant in charge of the train were negligent. While the conductor testifies that he did not discover the separation of the train until they were within 150 yards of the point where the intestate was killed, the brakeman with him in the cupola of the caboose states that he discovered the separation when the train was passing the section house, which is shown to be about one-half mile from the place where intestate was killed.

II. The jury, we think, were authorized to find that the conductor was negligent in not discovering the separation sooner, and the brakeman was negligent in not informing him of the separation as soon as it was discovered; that they were negligent in not being upon the tops of the cars, where they could have controlled their motion by use of the brakes, and signaled danger, if they discovered any one exposed thereto, and that had proper care been exercised in this respect the intestate would have been enabled to escape from the track.

III. Was the deceased wanting in care? It must be con-

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ceded that he went upon the track without directing his eyes
2. —: to the detached cars. No one, ordinarily, can,
contributory
negligence. in the exercise of care, go upon a railroad track
without looking for approaching cars. But it would be un-
reasonable to hold that the law requires a person to look for
cars moving after a train, and within one hundred feet of it,
especially upon parts of the road where, as in this case, there
are no switches. When one has waited until the train goes
by he does not cast his eyes backward to see if another train
is following within one hundred feet. The deceased, it may
readily be understood, from his position on the bank did not ob-
serve the separation of the train. In this he was not negli-
gent, for it was not a part of his duty to notice the length or
other characteristics of the approaching train.

It may not have been readily observed from the position
in which he stood. He descended from the bank and then
waited until the last car, as he supposed, had passed. The
noise of the three cars following was drowned in the greater
noise of the train before him. In our opinion his act of walk-
ing upon the track was not in the absence of care. These
views, we think, are supported by the following cases: *Brown*
v. N. Y. C. R. R. Co., 32 N. Y., 597; *Bucler v. M. & St. P.*
R. Co., 28 Wis., 487; *McGovern v. N. Y. C. & H. R. R. R.*
Co., 67 N. Y., 417; *French v. Talleston Branch R. R. Co.*,
116 Mass., 537.

The intestate, it will be remembered, was about 400 feet
from his comrades when he gave the signal. His duty re-
quired him to join them. To do so he must cross the rail-
road track, for they were north and he south of it. He was,
therefore, in the discharge of his duty in going upon the track.
We think it cannot be claimed that it was negligence for him
to attempt to return on the track. He did not go upon it as
a trespasser and without authority. The law will not charge
him with negligence because he did not attempt to cross the
track by a course at right angles with it. While it cannot
be denied that the deceased was authorized in the discharge

of his duty to cross the track, it is urged that, in attempting to do so by walking lengthwise along the track, or diagonally across it, he was negligent. The thought of the objection is that his duty required him to cross the track by a course at right angles with it. It may be admitted for the purpose of argument that had he crossed the track in this manner he would have escaped death.

It will be remembered that deceased was not negligent in not looking for the approaching cars; that he had a right to presume the train was run in the usual manner, and with the usual care upon the part of those operating it.

He was justified in believing that he incurred no danger by going upon the track, for the reason that he was authorized to presume there were no more cars and no other train following in dangerous proximity to the train that had just passed. Being authorized to act upon this presumption, he was not negligent unless the walking upon the track for more than 400 feet immediately following a train would expose him to danger from another train which might be following, if the trains were run with ordinary care and in usual proximity to one another. If he walked with usual speed it would require about one minute, certainly not more than a minute and a half, for him to pass over the 400 feet between the point at which he went upon the track and the point where his comrades were awaiting him. He could have relied upon the presumption that another train would not be following the passing train within ninety seconds, for railroad trains are not run in such reckless manner. Now relying upon this presumption, and being charged with the duty of returning to his comrades, it was not negligent for him to walk lengthwise along the track or cross it diagonally. It is more than can be expected of a man, in the exercise of the highest care, that, when no danger threatens, he will cross the track of a railroad in a course at right angles with it, when a direct line to the point to which he is walking crosses the track diagonally. Instinct would prompt him to cross on the direct line.

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In the case before us the deceased was authorized to presume that he incurred no danger in crossing the track in the manner attempted by him; his duty required him to cross the track promptly. The law will not hold that he was guilty of negligence.

This case is distinguished from *Murphy v. C., R. I. & P. R. Co.*, 38 Iowa, 539, and same case, 45 Iowa, 661, for the reason that the deceased in those cases was not upon the railroad in the discharge of duty and was not authorized to presume that he could walk upon the track without danger.

IV. The defendant asked the court to give certain instructions to the effect that the intestate was not rightfully upon the track, and that he was negligent in walking thereon. These instructions were refused, and the court, by instructions given, recognized the right of the intestate to go upon the track, if he exercised due care. The rule expressed by the decision upon the instructions, as applicable to the case, is surely correct. We have pointed out that the intestate was on the track in the discharge of his duty, and, therefore, rightfully there.

V. The court below in an instruction used this language: "No person has the right to assume, when about to go onto a s. — : —. railroad track, that a train is not coming, without looking for himself to see if one is not coming." It is insisted that under this instruction the deceased was guilty of negligence, as it is shown that he did not look, before going upon the track, in the direction from which the train was running; that the instruction holds that he was required to look for an approaching train. This instruction it is claimed is the law of the case, and the jury disregarded it in finding deceased was not guilty of negligence. We need not inquire whether the instruction it correct as a general rule. As we have seen, it is not applicable to the facts of the case. In our opinion, if it be regarded as the law of the case, the verdict is not in conflict therewith. The jury, of course, were to apply the instruction only in case they found facts to which it was

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applicable. They found according to the testimony that the intestate was killed, not by a train of cars following the one which just passed him, but by two or three detached cars from the passing train. The instruction does not direct that he should look for detached cars. We cannot extend the instruction so that it will include a subject not expressed in its language, when such construction would result in reversing the judgment in the case. The instruction, therefore, cannot be construed to mean that the intestate was required to look for the detached cars of the train. The verdict of the jury is not, therefore, in conflict with the instruction.

VI. The counsel for the defendant asked an instruction to the effect that it is not negligence to run cars detached from locomotives, and that a person stepping upon the track before a car so run cannot recover. It was refused. But the negligence in this case was not the running of the cars after the separation—that may have been unavoidable—but the want of proper care in so running them, by following at a great speed near the preceding train without proper precautions against danger. The instruction is not applicable to the case.

VII. Other instructions related to the duty of defendant's employees in case they had seen the intestate standing by the side of the track. It is said they would have been authorized to suppose he would have kept off the track, and, therefore, would not have been required to give him signals of danger. But the case supposed in the instructions is not found in the record. It is not shown that the employees of defendant saw the intestate by the side of the track; in fact they did not see him there, and their negligence consisted in their being in a position where they could not see him when on the track, and where they could not warn him or check the train.

VIII. The court in a prolix instruction directed the jury to determine from the evidence certain enumerated facts, informing them that these facts should be considered in order

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to reach a conclusion in the case. We confess that the instruction could have been well omitted. But we fail to discover that prejudice to defendant was wrought by it. It is not claimed by counsel that incorrect principles are announced in the instruction, or that facts were enumerated which ought not to have been considered. The instruction is not a ground for disturbing the judgment.

IX. An instruction given to the jury uses this language: "If you fail to find that the deceased was not guilty of negligence contributing to his death, your verdict will be for defendants." This instruction counsel for defendant complain of. We think, while it is not well expressed, it does not announce an erroneous rule. Another instruction informs the jury that, to entitle plaintiff to a verdict, they must find the intestate was without fault or negligence. The jury surely would understand the two instructions considered together to mean that, to authorize a verdict for plaintiff, they must find the intestate exercised care and was not guilty of negligence. And this is substantially the rule insisted upon by counsel for defendant in their argument.

The foregoing discussion, we believe, disposes of all questions presented in the argument of counsel. We think the judgment of the District Court ought to be affirmed.

AFFIRMED.

SEEVERS, J., *dissenting*.—I. The court instructed the jury as follows:

"VII. The defendant has the right to use its track for the passage of trains at all hours and times, and with such frequency as it desires, and it is the duty of all persons about to step on such track to conduct themselves with reference to such rights, and to exercise care and caution relative thereto. No person has a right to assume, when about to go onto a railroad track, that a train is not coming, without looking for himself to see whether one is coming. The track of a railroad is a place of danger and a place where the trains have the first, that is, the prior and paramount, right, and all per-

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sons about to go onto it must go there knowing the danger, and the prior right of the trains, and conduct themselves with due care."

This instruction constituted the law of this case, whether correct or not, and it was the duty of the jury to have followed it. The undisputed facts are, and it is conceded in the foregoing opinion, the deceased stepped on the track without looking in the direction the detached cars were coming. If he had done so the undisputed fact is he could have seen the cars. If, therefore, the jury had followed the instruction their verdict must have been for the defendant.

The opinion holds the deceased was not bound to look, because he had the right to suppose all the train had just passed and there were none following so closely after the cars which had passed. It is evident the case was not tried in the court below on any such theory. It is immaterial that the detached cars formed only a portion of a train instead of a whole train, where the result must have been the same if the deceased had "*looked*" as the instruction requires he should have done.

II. The defendant asked the court to instruct the jury as follows: "If you believe from the evidence that the deceased, at the time of this accident, was walking length-ways on defendant's track, and that the point where he was walking was not a public highway, then to be lawfully there he must have been engaged in the performance of some duty to defendant, requiring him to be thus walking on said track." This instruction was refused. It should, I think, have been given. It was for the jury to say whether the deceased was lawfully on the track in the performance of some duty. If this be not so, it is strongly favorable to the plaintiff. But the opinion holds as a matter of law the deceased was lawfully on the track in the performance of some duty. This, in my judgment, is radically wrong. There are other views stated in the opinion in which I do not concur, but I do not care to extend this dissent, and therefore do not enter upon their discussion.

AKERS V. LUSE ET AL.

1. **Vendor and Vendee: VENDOR'S LIEN: WAIVER OF.** A vendor who takes in payment for land sold a promissory note with a surety thereby waives his right to a lien, which is not reinstated by the fact that the surety becomes insolvent before the maturity of the note.

Appeal from Johnson District Court

WEDNESDAY, JUNE 15.

ACTION to enforce a vendor's lien. The plaintiff sold and conveyed certain real estate to the defendant Marvin R. Luse, and took therefor a promissory note signed by him and one Starkey. Afterwards both Luse and Starkey failed in business and became pecuniarily irresponsible, and the note is unpaid. To the petition setting up the above facts the defendants demurred upon the ground that it appeared that the plaintiff's vendor's lien was waived by taking a note from the purchaser for the purchase money signed by Starkey. The court sustained the demurrer. The plaintiff standing by his petition, judgment was rendered for the defendants. The plaintiff appeals.

William J. Haddock, for appellant.

Jos. A. Edwards and *W. F. Hurdman*, for appellees.

ADAMS, CH. J. Where a vendor of real estate takes collateral security for the purchase money he thereby waives, presumptively, his vendor's lien. *Kendrick v. Eggleston*, ante, 128. It is denied, however, that the petition shows that the plaintiff took collateral security, because, while it is shown that he took a note signed by Starkey, yet it is averred that Starkey is irresponsible. The plaintiff relies upon *Johnson v. McGrew et al.*, 42 Iowa, 555. But in that case the note alleged to constitute security did not become the plaintiff's property. In

1. VENDOR
and vendee:
vendor's lien:
waiver of.

Fairburn v. Goldsmith.

the case at bar the collateral security consists in the name of Starkey as surety, and no question is raised in regard to liability. The only question raised is in regard to the value of Starkey's name. Now we are not prepared to say that where the vendor of real estate takes as collateral security the note of an insolvent person he does not thereby waive his vendor's lien. But in the case at bar it does not appear that Starkey was insolvent when the plaintiff took the note. Indeed it is shown that he failed about two years afterward. If the plaintiff waived his lien when he took the note, we do not think that it could be deemed to be reinstated by reason of the fact that afterwards Starkey became insolvent. *Kendrick v. Eggleston*, above cited. In our opinion the demurrer was properly sustained.

AFFIRMED.

FAIRBURN V. GOLDSMITH ET AL.

1. **Appeal: FILING OF TRANSCRIPT: PRACTICE IN THE SUPREME COURT.**

An appeal must be taken within six months after the rendition of the judgment or order appealed from, but it is not required that it shall be perfected by the filing of a transcript in the Supreme Court within that time.

2. ———: ———. Where good faith is shown by the appellant his appeal will not be dismissed for a failure to file a transcript until after he has had timely notice that one will be required by the appellee.

Appeal from Sac Circuit Court.

WEDNESDAY, JUNE 15.

BY THE COURT. A motion has been made to dismiss this appeal because no transcript has been filed and the appeal

was not taken and perfected within six months after the rendition of the judgment. Appeals must be taken within six months after the rendition of the judgment or order appealed from. Code, § 3173.

56	347
78	230
56	347
85	17
85	609
56	347
88	208
56	347
104	396
106	314

Fairburn v. Goldsmith.

An appeal is taken by the service of a notice in writing on the adverse party, his agent or attorney. Code, § 3178.

The notice in this case was served as above provided within six months after the rendition of the judgment. But it is said this is not sufficient, and that the appeal must be perfected within six months after the judgment. It is further said this cannot be regarded as having been done until the "clerk has been paid or secured his fees for a transcript." Code, § 3179; *Loomis v. McKenzie*, *post*. It seems to us a distinction is recognized by the statute between an appeal and a perfected appeal. The appeal must be taken in the time by the service of the notices required by the statute, and there is no provision fixing a time when it must be perfected by paying or securing the fees of the clerk for a transcript.

Where the fees of the clerk are so paid or secured the clerk must forthwith forward the transcript to the clerk of this court. Code, § 3179. If appellant fails to
2 — : — file a transcript and have the case docketed so that it may be heard in this court at the time appellee is entitled to have the same tried, and appellant fails to show a sufficient excuse for his failure, the appellee may have the appeal dismissed or the judgment affirmed. Code, § 3181. But no appeal shall be dismissed or the judgment affirmed because the cause has not been docketed or transcript filed in the Supreme Court, if it be made to appear that the appeal was taken in good faith and not for delay, or if from conduct of appellee or his counsel appellant was induced to believe no motion to dismiss or affirm would be made. Miller's Code, § 783. It has been uniformly held under the foregoing statute that the preparation of an abstract, filing the same in this court, and having the cause docketed, was evidence of good faith, and that when this was done we would not dismiss the appeal or affirm the judgment. At the same time if a transcript has not been waived one must be furnished if the appellee so insists, but time will be given to do so unless the

Gilbert v. Sanderson.

appellant or his counsel have had notice one would be required, and through negligence has failed to furnish it.

In this case it appears one of the appellees notified his counsel not to make any concessions or agreements in relation to the appeal without advising him. It also appears that one of said counsel gave counsel for appellant to understand no transcript would be required. It does not appear that counsel for appellant had any knowledge of the instructions given by appellee to his counsel, and therefore counsel for appellant had the right to believe no transcript would be required. Therefore it cannot be said appellant has been negligent. The motion must be overruled and time given to procure a transcript if appellees still desire one.

GILBERT V. SANDERSON.

1. **Contract:** TO SETTLE MORTGAGE: CONSTRUCTION. A contract whereby one party agrees to settle a certain mortgage given by the other creates a personal liability on the part of the former to pay the indebtedness secured by the mortgage.
2. ———: ———: CANCELLATION OF. Such a contract may be canceled by the parties thereto, upon a sufficient consideration, at any time before it becomes known to, and is accepted by, the mortgagee.

56	349
94	683
56	349
95	230
56	349
101	287

Appeal from Clay Circuit Court.

WEDNESDAY, JUNE 15.

ACTION AT LAW. A demurrer to the answer was sustained, and defendant appeals.

Robinson & Milchrist and *C. L. Ward*, for appellant.

Lot Thomas, for appellee.

SEEVERS, J.—S. S. Warner executed certain notes to Homer A. Smith, and secured the same by mortgage on real

Gilbert v. Sanderson.

estate. The notes and mortgage were assigned to the plaintiff. There was a foreclosure and sale of the mortgaged premises, but only a portion of the indebtedness was realized. This action was brought to recover the amount of the indebtedness remaining unpaid. The action was based on the following written instrument:

“SIOUX RAPIDS, IOWA, January 13th, 1876.

“I, James Sanderson, do hereby agree to settle a mortgage now held against the north half of the north-east quarter and the south-west quarter of section eight (8), township ninety-three (93), range thirty-six (36), west of the fifth principal meridian, when due; said mortgage of seven hundred dollars (\$700.00), held by Homer A. Smith, and due in seven annual payments of one hundred dollars (\$100.00) each.

JAMES SANDERSON.”

“For a valuable consideration I hereby assign to A. L. Gilbert the foregoing contract and all my right and interest therein, with free power to enforce the same, and commence and prosecute suit thereon, in his own name.

S. S. WARNER.”

The defendant pleaded the mortgage had been fully satisfied and discharged by the foreclosure and sale of the mortgaged premises, and also

“3. For a further defense to the claims of the plaintiff, defendant states that on or about the _____ day of _____, A. D. 1876, and before said S. S. Warner had assigned the said obligation to plaintiff, and before plaintiff or his assigns had any knowledge thereof, and while the same was owned and held by said Warner, and before said notes and mortgage, executed and delivered by said Warner, were transferred to plaintiff, and while the same were held and owned by said Smith, payee thereof, that defendant and said Warner entered into an agreement—not in writing—whereby defendant agreed to surrender to said Warner all the claims and interest of defendant in said mortgaged premises, inclu-

 Gilbert v. Sanderson.

ding a deed therefor, executed by said Warner to defendant, and not recorded, and certain certificates of the sale of said premises for delinquent taxes, duly executed by the treasurer and auditor of Buena Vista county, and said Warner agreed to release defendant from all further liability on account of said written obligation of defendant, and to cancel the same and hold it for naught. Defendant further states that he executed said agreement on his part and surrendered to said Warner said deed, and transferred to him said certificates of tax sale, and performed on his part all the requirements of said agreement; that said Warner accepted said deed and certificates and entered into the possession of said premises, and defendant thereby became released from all liability on account of said obligations."

The demurrer assailed the sufficiency of the foregoing portions of the answer, and the questions discussed by counsel will be now considered.

I. The appellant insists there could not be a second foreclosure of the mortgage, and therefore it was "settled" or discharged, within the meaning of the writing upon which the action is based, when the foreclosure was obtained and the premises sold. In this view we do not concur. The clear import of the writing is that the defendant would pay or cause to be paid the indebtedness secured by the mortgage. The object being to thus, in so far as the parties could, release Warner from all personal liability, or at least to indemnify him from loss in case the mortgaged premises were insufficient to pay the indebtedness. If this was not the object and intent of the parties to the contract, they went through a useless form and ceremony.

II. Conceding the mortgagee, Smith, or the plaintiff, his assignee, could avail themselves of the benefits conferred by the contract, the remaining question is whether the mortgagee, Warner, for a valuable consideration could release and discharge the defendant from the obli-

1. CONTRACT:
to settle mort-
gage; con-
struction of.

2. —: —:
cancellation.

Gilbert v. Sanderson.

gation if done before the mortgagee or his assignee had knowledge of or accepted the contract, or whether it was irrevocable unless the mortgagor or the plaintiff assented to the revocation.

The authorities are not agreed as to the grounds upon which the person agreeing to pay the mortgage is held liable. In some of the adjudicated cases it has been held the contract of indemnity, or to pay the mortgage, operates as a collateral security, obtained by the mortgagor, which by equitable subrogation inures to the benefit of the mortgagee. This being so, it has been held to follow that the mortgagee can only recover a personal judgment against the person who agreed to pay the debt, when the mortgagor holds an obligation which will support the judgment; 1 Jones on Mortgages, § 762; *Crowell v. Currier*, 12 E. C. Green (27 N. J. Eq.), 152.

In the case at bar, Warner, the mortgagor, had released the defendant from all liability on the contract. Therefore, the doctrine of subrogation cannot apply for the reason the contract as to Warner must be regarded in the same light as if it had never existed. There is nothing on which a judgment can be supported.

In New York there are cases which hold the liability is incurred on the ground above stated, and others which hold it is incurred upon the broad principle that if one person make a promise to another for the benefit of a third person, the latter may maintain an action on such promise. *Garnsey v. Roberts*, 47 New York, 233.

It is upon the last ground it is said the cases in this State are based. *Ross v. Kennison et al.*, 38 Iowa, 396. There is dicta cited in *Garnsey v. Roberts*, it is said, indicating the contract is irrevocable unless the mortgagee assents to the revocation. No such question, however, was in the case.

The question under consideration arose in *Simpson v. Browne*, 6 Hun, 251, and it was there held in substance the contract could not be released by the mortgagor. This case, on appeal (68 N. Y., 355), was reversed on several grounds,

Gilbert v. Sanderson.

among which was that the mortgagor could release the indemnity before it had been assigned to the mortgagee, or came into his hands. To the same effect is *Stevens v. Casbacker*, 8 Hun, 116.

It has also been held, where one person makes a promise to another for the benefit of a third person, the person to whom the promise is made may execute a valid release of such promise before it has been accepted by the latter. *Dunham v. Bischoff et al.*, 47 Ind., 211; *Kelly v. Roberts*, 40 N. Y., 432.

In the case at bar the contract primarily was made to indemnify the mortgagor, Warner. It may be the plaintiff was entitled to the benefits of the contract, but this depended upon the question whether he desired to avail himself thereof. He could not be forced to do so. Now, before he had knowledge any such contract was in existence, the parties who made it agreed upon a valuable consideration to release the obligation thereby assumed. Having the power to enter into such contract it would seem to follow they could enter into another whereby the former ceased to be of any force or effect, unless in the meantime the person for whose benefit it was made in some manner has indicated he accepts the contract, or it can be implied he did so. By so doing he acquires the rights and assumes the burdens incident thereto.

It is said the court below based its ruling on something that is said in *Corbett v. Waterman*, 11 Iowa, 86. The question in that case was not in the one before us, and we have great doubt whether there is anything said by way of argument which has any material bearing on the case at bar.

The appellee suggests the answer shows the real estate was conveyed by Warner to the defendant and that the latter has never reconveyed it. Therefore it is said the legal title is still vested in him. This may be true, but it is clear from the answer that the defendant has no beneficial interest in the real estate. At most he holds the naked legal title in trust. Conceding a consideration was necessary to support

Singer & Benedict v. Sheldon.

the release as against the plaintiff, the answer shows there was such consideration independent of and in addition to the delivery of the deed. Upon the ground herein indicated the demurrer should have been overruled.

REVERSED

SINGER & BENEDICT V. SHELDON.

1. **Sale: EFFECT OF BILL OF SALE: FRAUD.** The fact that a sale of goods is evidenced by a bill of sale duly executed and recorded will not preclude an officer seizing the goods, under process issued in actions by creditors of the vendor, from attacking the sale as fraudulent.

Appeal from Howard District Court.

WEDNESDAY, JUNE 15.

ACTION OF REPLEVIN. There was a verdict and judgment for defendant for a small part of the property. The defendant appeals. The facts of the case appear in the opinion.

Powers & Kenyon, Gurney & Boylan, and H. Shaver,
for appellant.

Brown & Wellington, for appellees.

BECK, J.—The plaintiffs seek to recover certain clothing and other goods constituting a stock of merchandise which defendant, as sheriff, had seized upon certain attachments and executions against Chapman & Sage. The answer admits the possession and seizure of the goods under the process of the court, but alleges that the property is subject thereto, having been fraudulently transferred by Chapman & Sage to plaintiffs, under a secret trust for Chapman & Sage.

II. The issues in the case involve the sufficiency and good faith of the transfer of the goods by Chapman & Sage to plaintiffs. This transfer was made by a bill of sale duly acknowledged and recorded. The court

1. SALE: effect
of bill of sale:
fraud.

Singer & Benedict v. Sheldon.

instructed the jury that if they found the bill of sale was made and recorded, and that "Chapman informed the sheriff, when he came to levy the writs, that the goods belonged to Singer & Benedict, your verdict will be for plaintiffs for all the property, except the twelve cords of wood and three hundred posts." No question arises about the wood and posts. The fact that the transfer was made by a written bill of sale, acknowledged and recorded, as provided by Code, § 1923, the possession of the property remaining in the vendor, does not preclude the defendant assailing the transaction on the ground that it was fraudulent, and created a secret trust for the benefit of the vendor. There may be actual fraud in a sale of goods witnessed by a written instrument, contemplated by the statute just cited, which is intended to render valid *bona fide* sales where the vendor retains the possession of the property, in the absence of actual notice to creditors or purchasers. The instruction ignores the issue of fraud, raised by the answer of defendant, and, under it, the jury were required to find for plaintiffs, even though there was evidence tending to show that the transaction was fraudulent. There was evidence tending to show that the vendors were unable to pay their debts, if not insolvent, and that the goods exceeded in value the claim which the vendees held against the vendors, which constituted the consideration for the goods. There were other circumstances tending to establish fraud. This evidence should have been submitted to the jury, with proper instructions on the issue of fraud.

III. Counsel for plaintiffs insist that there is no evidence tending to show that the vendors were insolvent, or to authorize an inference that they had not ample means to pay their debts. We think differently. The evidence shows that they were largely indebted; that many attachments and executions were issued against them, and that one of the vendees testifies that he regarded the claim he held against them as doubtful, or, to use his own language, "a very poor one." This evidence tends to show the insolvency of the vendors, and will not per-

Singer & Benedict v. Sheldon.

mit a presumption that they had sufficient property to pay their debts.

IV. Counsel for defendant insist that the bill of sale is void for uncertainty in the description of the property, and therefore did not operate to impart notice to defendants; he, therefore, claims that the court erred in admitting it in evidence. The instrument was surely competent evidence of the fact of its execution. The court did not err in admitting it in evidence for whatever it was worth. If it be conceded that it did not operate to impart notice on account of the defective description, the proof shows that defendant had notice of the sale. No prejudice resulted to defendant from the admission of the instrument in evidence.

V. A witness who is an attorney was asked certain questions which were intended to elicit conversations had by him with the parties at and before the sale of the goods. The evidence was rejected on the ground that it was intended to establish communications between the attorney and his client. We think the ruling is correct. The testimony shows that the witness was the attorney of the parties employed in the business pertaining to the sale, and was consulted as such.

Other questions discussed by counsel need not be considered. For the error committed by the court in the ruling upon instructions, the judgment is

REVERSED.

BROQUET V. STERLING ET AL.

1. **Practice: OFFER TO REDEEM FROM TAX SALE: COSTS.** Where a plaintiff offers to redeem from a tax sale of property to the defendant, which redemption is decreed upon a trial, the plaintiff is entitled to recover the costs of such trial.
2. **Mortgage: REDEMPTION FROM TAX SALE: LIEN.** A mortgagee who redeems the mortgaged property from tax sale is entitled to a lien for the amount paid in addition to the amount of his mortgage.

Appeal from Buchanan Circuit Court.

WEDNESDAY, JUNE 15.

ACTION for the foreclosure of a mortgage on 120 acres of land. The plaintiff amended his petition by averring that after the execution of the mortgage to him eighty acres of the land was sold at tax sale to one of the defendants, and a tax deed made therefor; that the sale was fraudulent and void for various reasons, and the plaintiff offered to pay to the parties entitled thereto the amount necessary to redeem from such tax sale, and asked that he be permitted to redeem therefrom, and that the amount necessary to be paid to redeem from such sale be made a lien upon said premises in his favor superior to any claim of the other defendants. Issue was taken on this amendment by the holder of the tax title. On November 4th, 1879, the cause was tried as to the note secured by the mortgage, and judgment was rendered in favor of the plaintiff and against the mortgagor, for the amount of the note, interest, attorney's fees and costs. On the 5th day of April, 1880, the cause came on for hearing and the plaintiff tendered to the defendants \$106 for the redemption of the land from the tax sale. A trial was afterwards had, and the court by consent took the cause under advisement, and in vacation filed a decree declaring the tax deed to be void, and permitting the plaintiff to redeem therefrom, and that the \$106 tendered by the plaintiff

 Broquet v. Sterling.

should be in full of the redemption. The decree further finds as follows: "That no tender having been made by plaintiff until the trial, all costs, not included in the judgment heretofore rendered against the defendant Sterling, shall be taxed to plaintiff," and the decree directs the sale of the premises in satisfaction of the judgment against the said B. F. Sterling, but omits to make the amounts paid in redemption a lien on the land.

C. E. Ransier, for appellant.

No appearance for appellees.

ROTHROCK, J.—I. The plaintiff claims that having made the offer to redeem at the time he filed his amendment attaching the tax title, and having succeeded in defeating the title, he should not be required to pay the costs of the trial on that issue. Under the rule established in *Springer v. Bartle*, 46 Iowa, 688, the position of the plaintiff is correct. After the offer to redeem was made the defendant ought not to be allowed to try the validity of the tax title, and, upon the failing in the action, recover costs.

II. It is next claimed that the amount paid in redemption should have been made a lien on the land. In this also the plaintiff is correct. *Strong v. Burdick*, 52 Iowa, 630.

REVERSED.

HALL V. ROYCE.

1. **Practice: ACTION BROUGHT IN WRONG COUNTY: TRANSFER OF.** Upon the transfer of an action begun in the wrong county to that of the defendant's residence, the original papers are required to be filed in the court to which the transfer is made, and where they are not so filed ten days before the next ensuing term of such court the cause will be deemed discontinued. Such omission is not waived by the appearance of the defendant to move a dismissal of the action.

Appeal from Butler Circuit Court.

WEDNESDAY, JUNE 15.

THIS action was commenced in the Circuit Court of Floyd county, at the September term, 1879, and notice was served on the defendant in Butler county. At the September term the defendant appeared and made application for change of the place of trial to Butler county, on the ground that the defendant was a resident of that county, and also for an order for compensation for being compelled to attend to the suit in the wrong county. The application was sustained, and an order was made transferring the cause as prayed, and awarding to the defendant twenty-five dollars for his trouble and expense in attending upon the court in the wrong county.

At the January term, 1880, of the Floyd Circuit Court, and at the May term, 1880, the cause remained on the calendar, and was continued by order entered in the usual form. At the September term, 1880, of said court, the cause being still on the calendar, the defendant filed a motion to strike it from the docket, because the same had been finally disposed of by order of the court at the September term, 1879. The motion was sustained.

On the 26th day of August, 1880, plaintiff served upon defendant's attorney a notice in writing to the effect that he would cause to be filed in the office of the clerk of the Circuit Court of Butler county the papers in said cause, and a certified copy of the record, and that said cause would be brought on

Hall v. Royce.

for hearing at the November term, 1880, of said court. On the 21st of October, 1880, there was filed in said office a duly certified copy of all the papers filed in said cause in the Floyd Circuit Court, also a duly certified copy of the record of the cause in said court.

At the November term, 1880, the cause having been placed on the calendar by the clerk of the Butler Circuit Court, the defendant filed a motion to strike it therefrom, on the grounds that said cause was discontinued by the failure of the plaintiff to comply with the order of the court changing the place of trial, and by failure of plaintiff to cause to be filed in the Butler Circuit Court the papers and copy of the record in the cause, as required by law.

The motion was overruled. Defendant appeals.

Hemenway & Polk, for appellant.

J. W. Merrill and *J. H. Scales*, for Appellee.

ROTHROCK, J.—The order for a change of the place of trial was made under section 2589 of the Code, which provides

1. PRACTICE: that “if the sum so awarded (the amount allowed
action brought in wrong court: transfer of. the defendant for attending at the wrong county)
and costs are not paid to the clerk at a time to be
fixed by the court, or if the papers in such case are not filed
by the plaintiff in the court to which the change is ordered
ten days before the first day of the next term thereof, or, if
ten days do not intervene between the making of said order
and the first day of the next term of said court, ten days pre-
ceding the first day of the next succeeding term thereof, in
either event the action shall be deemed to be discontinued.”

When the order for change of place of trial was made, an appeal was taken to this court by the plaintiff, and the ruling of the Circuit Court was affirmed June 18, 1880. 54 Iowa, 136. There is some controversy between counsel for the respective parties as to whether a *supersedeas* bond was filed pending that appeal, and an order made staying pro-

Hall v. Royce.

ceedings. The appellee contends that such bond was filed, and the proceedings being thereby stayed, the transfer of the case could not be effected until the disposition of the appeal in this court. We do not find it necessary to determine this question, in the view we take of the case. If it should be conceded that the appeal suspended proceedings in the court below, this would not excuse the plaintiff for delay after the appeal was disposed of. The plaintiff served a notice in August, 1880, that he would complete the transfer, and that the cause would be ready for hearing at the November term, 1880, and on the 21st day of October he filed copies of the papers in the case in the office of the clerk of the Butler Circuit Court, and filed a copy of the record of said cause in that court. The statute requires that the papers—the originals, not copies, shall be filed, and for failure to do this the cause shall be deemed discontinued. One of the grounds of the motion was for this cause. This omission was not cured by the defendant's appearance, and moving to strike the cause. No action was pending, because it had been discontinued by operation of law. Section 2600 of the Code provides that if the petition be not filed by the date fixed in the original notice, "the action will be deemed discontinued." In *Cibula v. Pitts Manf. Co.*, 48 Iowa, 528, we held that in such case the appearance of the defendant for the purpose of moving a discontinuance of the action is not a waiver of the defect resulting from the failure to file the petition in time. The language of the section of the statute under consideration in this case is almost identical, in so far as the consequences resulting from a failure to comply with its provisions are involved, with the language in section 2600, and we think the case cited involves, in principle, the same question presented in this record.

In our opinion, the motion to strike the case from the calendar should have been sustained.

REVERSED.

56	262
136	718

McNAME V. MALVIN ET AL.

1. **Practice:** CLAIM AGAINST ESTATE: ERROR IN PROCEEDINGS. The fact that a claim against an estate, which should have been prosecuted by proceedings in probate, is sued in an ordinary action at law against the administrator is not ground for demurrer.
2. ———: ———: JUDGMENT AGAINST ADMINISTRATOR. A judgment rendered against an administrator, in an action wherein the court acquired jurisdiction of both parties and subject-matter, cannot be set aside on the ground that the claim was not regularly prosecuted in accordance with the statute governing the establishment of claims against estates.

Appeal from Delaware Circuit Court.

WEDNESDAY, JUNE 15.

THE petition in this case is entitled as follows: "Lawrence McName, administrator of the estate of Mason A. King, deceased, v. P. S. Malvin, Sarah Malvin, administratrix of the estate of Samuel Malvin, deceased."

The body of the petition is, in substance, as follows: That on the 17th day of November, 1870, in the lifetime of said Samuel Malvin, he, the said Malvin, made his joint promissory note in writing to Mason A. King and Phoebe King, by which he promised to pay said Mason A. King four hundred dollars, with interest. A copy of the note is set out, which appears to have been executed by P. S. Malvin, Samuel Malvin and Marion Cloud. It is further averred "that the note was duly presented to P. S. Malvin, as one of the administrators of said estate of Samuel Malvin, and by him duly approved as a valid and subsisting claim against said estate." The prayer of the petition is as follows: "Wherefore the plaintiff asks judgment against Sarah Malvin, as administratrix of the estate of Samuel Malvin, for \$300, and for costs." Certain payments were indorsed on the note.

The defendant, Sarah Malvin, demurred to the petition on the following grounds:

McName v. Malvin.

"1st. That the facts stated in the petition do not entitle the plaintiff to the relief demanded.

"It appearing on the face of the petition that plaintiff's claim is a mere money demand against the estate of Samuel Malvin, deceased, and no facts whatever are stated showing that this defendant has rendered herself liable to pay the same.

"Plaintiff also alleges that said claim was presented to this defendant's co-administrator, and by him allowed as a valid claim against the estate of Samuel Malvin, deceased, and his remedy is not in this court against this defendant in an original action.

"2d. Because this court has no jurisdiction of the subject-matter of this action. It appearing from said plaintiff's petition that said claim is a mere money demand against the estate of Samuel Malvin, deceased, and no facts are stated in said petition showing that the defendant has ever rendered herself liable to pay the same."

The demurrer was overruled, and defendant refusing to plead over, it was adjudged that plaintiff recover of the defendant, as administratrix of the estate of Samuel Malvin, the amount due on the note, said judgment to be treated as a claim of the fourth class against the estate of the said Samuel Malvin, deceased, and to be paid as a fourth-class claim.

At the next term of the court a motion was made by the defendant to set aside the judgment and establishment of the claim, which motion was overruled. Defendant appeals.

Utt Brothers, for appellant.

C. B. Kennedy, for appellee.

ROTHROCK, J.—I. If we understand the first ground of demurrer, it is this: That no facts are stated in the petition which would authorize a personal judgment against the defendant, and that the remedy is against the estate of the maker of the note, and not against the defendant in a personal

McName v. Malvin.

action. But this ground of demurrer assumes a fact not warranted from the averments of the petition. No personal judgment is demanded therein against the defendant. It is asked that a judgment be rendered against her as administratrix, which means simply that the demand be established as a claim against the estate.

II. The next ground of demurrer goes to the jurisdiction of the court, and, as we understand it, the defendant claims that the demand should have been filed on the probate side of the court. But a mistake as to kind of proceedings adopted by the plaintiff is not ground for demurrer. The defendant should have moved to transfer the cause to the probate calender, if it was thought that was the proper forum. *Ashlock v. Sherman, ante*, 311.

III. The motion made at the succeeding term to set aside the judgment was properly overruled. It was based for the most part upon the ground that the court erred in entertaining the action, for the reason that the petition and proceedings were not based upon the statute for establishing claims against an estate, and because the claim was not filed in twelve months after the administrators gave notice of their appointment, and because it was barred by the statute of limitations.

This motion came too late. The court had jurisdiction of the parties and of the subject-matter. What evidence it had before it does not appear. The defendant should have made her resistance to the claim before judgment. This disposition of the cause renders it unnecessary to determine the motion filed by appellee.

AFFIRMED.

ADDICKEN ET AL. V. HUMPHAL ET AL.

56	365
106	588
56	365
118	728

1. **Conveyance: FRAUD.** Evidence considered and held insufficient to establish fraud in a conveyance of real estate by a husband to his wife.

Appeal from Winneshiek Circuit Court.

WEDNESDAY, JUNE 15.

ACTION in equity to subject certain real estate conveyed by the defendant Martin to his wife, who is made defendant, to the payment of a judgment against him, on the ground the conveyances were made with intent to hinder and delay the creditors of said Martin, in which fraud the defendant Anna participated, as was alleged in the petition.

Separate answers were filed by the defendants, admitting the conveyances as alleged in the petition but denying all fraud, and the said Anna further alleged in her answer she had paid a good and valuable consideration for the premises, and that a portion thereof "was the homestead of defendants prior to the time any of plaintiffs' said claims accrued."

The court decreed that all the real estate except the homestead should be sold and the proceeds applied in payment of the judgment, and the defendants appeal.

Brown & Wellington, for appellants.

No appearance for appellees.

SEEVERS, J. The conveyances are referred to in the abstract as exhibits "A" "B" "C" "D," and were all executed in 1872. The judgment was rendered in 1876, but conceding it was rendered on an indebtedness existing when the conveyances were executed, about which there are doubts, we have the question whether the conveyances were voluntary, without consideration, and made with intent to defraud creditors.

Addicken v. Humphal.

There is no evidence tending to show the defendant Anna had knowledge her husband was indebted to the plaintiffs when the conveyances were made, or that he was indebted to any one else except "for a horse" we infer he had purchased. The amount of this indebtedness, or whether it still subsists, does not appear.

There is no evidence tending to show the conveyances were made with any fraudulent intent, but the ground relied on by plaintiffs is they were voluntary and without consideration, and, therefore, the premises therein described should be subjected to the payment of said judgment.

The defendants testified, and they are corroborated by the evidence of the defendant Martin's father, that the defendant Anna paid her husband four hundred dollars for the real estate. There is no evidence tending to cast serious doubts on the testimony of the defendants. It must, therefore, be regarded as true.

In determining the value of the real estate the homestead should be excluded. For, under the circumstances, it could not be subjected to the payment of the judgment if it be conceded it was conveyed voluntarily and without consideration. *Delashmut v. Trau*, 44 Iowa, 613.

It is impossible to determine from the description of the premises set out in exhibit "A" the quantity of land thereby conveyed, and no witness states the value thereof. There is evidence which fixes the value per acre of some of the real estate, but we cannot say it is that described in said exhibit. Conceding, however, it is that tract to which the evidence applies, we cannot approximate to the value because the number of acres has not been shown.

The premises in exhibits "B" and "C" were worth, according to the evidence of Sydlow, \$160 at the time he testified. We are not able to say with the requisite degree of certainty that any other witness testified as to the value of these tracts.

In exhibit "D" the homestead and other real estate consisting of lots in the town of Conover is described.

There is evidence showing the value of the homestead, but not of the other lots. We cannot, therefore, say the conveyances were made without consideration. On the contrary, we are of the opinion under the evidence the defendant Anna paid the full value of the premises, if the homestead is excluded. This being so, and as there was no fraudulent intent in fact, the court below erred in subjecting any portion of the real estate to the payment of the judgment.

REVERSED.

COOPER V. DILLON ET AL.

1. **Appeal:** AMOUNT IN CONTROVERSY: HOW DETERMINED. Where no counter-claim is filed, the amount in controversy in an action is to be determined from the allegations of the petition, rather than from the amount claimed in the prayer.

Appeal from Hardin Circuit Court.

WEDNESDAY, JUNE 15.

THIS is an action involving the obligation of the defendants to erect and maintain a partition fence on the line between lands owned by the respective parties. It appears that, a controversy having arisen as to the obligation to erect the fence, the plaintiff applied to the township trustees, who met and determined that the fence should be built, and assigned to each party his portion thereof, and fixed a time within which the same should be erected. The defendants neglected to build the portion assigned to them, and after the time fixed by the trustees the plaintiff proceeded to erect, and did erect, the same. The trustees were thereupon called to assess the value of the defendant's portion of said fence so erected by

56	367
96	250
56	367
96	379
56	367
100	751
101	111
56	367
112	102

Cooper v. Dillon.

the plaintiff, and the plaintiff claims judgment for double the value of the fence as fixed by the trustees, and the fees of the trustees. There was a trial by the court, which resulted in a judgment for the plaintiff. Defendants appeal.

E. W. Eastman, for appellants.

S. M. Weaver, for appellee.

ROTHROCK, J.—Counsel for appellee claims that this court has no jurisdiction of the appeal because the amount in controversy as shown by the pleadings does not exceed one hundred dollars, and there is no certificate of the trial judge as required by section 3173 of the Code.

1. APPEAL:
amount in
controversy:
how deter-
mined.

No cross-claim was filed by the defendants, and the amount in controversy, as shown upon the face of the petition, must determine the question. It appears from the petition that the trustees assessed the value of the fence in controversy at \$40, and that their fees amounted to \$8. The prayer of the petition is as follows: "Plaintiff therefore demands judgment against the defendants in twice the amount of the value of said fence, and fees of said trustees as shown by said certificate, in all \$110, and for costs." It is doubtful whether under this prayer plaintiff intended to include double the amount of the fees. But whether he did or not, he was at the most entitled to recover but ninety-six dollars, and the amount of his recovery must be fixed by the allegations of his petition, rather than by the prayer thereof. If the defendants had made default he could not have recovered \$100.

Counsel for appellant claims that plaintiff was entitled to one per cent a month on the amount found by the trustees under section 1491 of the Code, and that this would make the amount in controversy exceed \$100. There are two answers to this position. 1st. The petition does not claim such interest, and 2d. This action is brought under sections 1492 and 1493 of the Code, which allow a recovery of double

Cunningham v. Wilde.

the value of the fence, and not one per cent a month in addition thereto.

In our opinion the amount in controversy did not exceed \$100, and this court having no jurisdiction the appeal must be dismissed.

APPEAL DISMISSED.

CUNNINGHAM V. WILDE ET AL.

1. **Dower:** LAW GOVERNING ASSIGNMENT OF. The assignment of dower to a widow is governed by the law in force at the time of the death of the husband. Following *Lucas v. Sawyer*, 17 Iowa, 517.

Appeal from Dubuque District Court.

WEDNESDAY, JUNE 15.

THE plaintiff brings this action for the assignment of dower in certain lots in the city of Dubuque. She alleges that she was married to John Cunningham, in April, 1840, and that he died in 1880; that in June, 1840, he purchased the lots in question, and they were sold on execution against her husband, October 9th, 1841, but that she never released her right of dower therein.

A demurrer was interposed to the petition, which the court sustained. The plaintiff appeals.

T. S. & H. E. Wilson, for appellant.

McCeney & O'Donnell, for the appellees.

DAY, J. Appellant's counsel concede that the case of *Lucas v. Sawyer*, 17 Iowa, 517, is adverse to the position which they assume, and in an argument exhibiting much research and earnestness, they ask that that decision be re-examined and overruled. *Lucas v. Sawyer* was decided in

Scofield v. Ford.

1864. It is not a hasty or ill-considered decision, but, upon the contrary, the question is elaborately discussed and deliberately determined. The decision announces a rule of property. For seventeen years it has passed unchallenged by the legislature, and, so far as we are advised, by the profession. It was followed in *Sturdevant v. Norris*, 30 Iowa, 65, and, quite recently, in *Parker v. Small*, 55 Iowa, 732. This seems to be a most fitting occasion for the application of the salutary maxim, *stare decisis et non quieta movere*. The demurrer, in our opinion, was properly sustained.

AFFIRMED.

SCOFIELD V. FORD.

1. **Promissory Note: MATERIAL ALTERATION: SEVERANCE OF CONTRACT.** Where a contract all written upon one paper is severed, leaving one portion in the form of a negotiable promissory note, signed by one of the parties, such severance constitutes a material alteration of the contract, and no recovery can be had on the note, even in the hands of a *bona fide* purchaser for value before maturity, unless the maker is chargeable with gross negligence in its execution.

Appeal from Washington Circuit Court.

THURSDAY, JUNE 16.

ACTION upon a promissory note made payable to M. Woodward or bearer and transferred to the plaintiff. The defendant admits the signature, but avers that he was induced to execute the note by fraud; that he undertook to sell seeders and cultivators as agent of Woodward, that he signed a paper as a contract setting forth the terms of the agency; that he had no intention of signing a promissory note, but that the paper signed contained words in the lower right hand corner which taken by themselves constitute the note in question; that after his signature was obtained, the part containing these words was cut off with his signature attached thereto.

56	370
88	539
56	370
93	146

Scofield v. Ford.

There was a trial by jury, and the court gave two instructions which are in these words:

"1. The defendant has admitted that the signature to the note is genuine, and it is also admitted by the plaintiff that the note was procured from the defendant by fraud. This being true the burden of proof rests upon the plaintiff to satisfy you by a preponderance of the evidence that he gave value for it, and that he is a *bona fide* purchaser before the maturity of the note.

"2. But if you find from the evidence that at the time the note in question was signed it formed a part of a contract printed and written upon a large piece of paper, and that such contract when signed contained no promise to pay money except upon certain conditions, that after such signing and without the knowledge or consent of the defendant the paper now in suit was cut out of the lower right hand corner of the contract in such a manner as to leave the paper so cut out in the form of a negotiable promissory note, as it now appears, the plaintiff cannot recover even if he is a *bona fide* purchaser for value before maturity, and in case you so find your verdict will be for the defendant."

There was a verdict for the defendant, and judgment was rendered thereon. The plaintiff appeals.

H. W. Scofield, for appellant.

Dewey & Templin, for appellee.

ADAMS, CH. J. This court has held that where a negotiable promissory note passes into the hands of a *bona fide* holder for value before maturity the maker cannot escape liability upon the ground that he was induced to execute the note by fraud, even though he was not intending to execute a promissory note, but a contract of a different character. *Douglass v. Matting*, 29 Iowa, 498. That case is relied upon by the plaintiff. But the case at bar differs from that case in this,

1. PROMISSORY
note : material
altera-
tion : sever-
ance of con-
tract.

Scofield v. Ford.

that the instrument signed was altered by cutting off a part of it. It is true, what now constitutes the instrument sued on contains the same words and figures that it did before it was signed, but the claim of the defendant is that the instrument as a whole, embracing what now constitutes the instrument sued on, had a different meaning, and contained no promise to pay money except upon certain conditions.

Cases have not unfrequently arisen where a paper was executed which was by itself a negotiable promissory note, but with which a memorandum or contract was connected which qualified the terms of the note. Afterwards, the memorandum or contract having been cut off and the note transferred to a *bona fide* holder for value before maturity, the question has arisen as to whether the maker could be held. In Daniel on Negotiable Instruments, 2 Vol., 366, it is said: "If the memorandum were so written upon the margin of the instrument that it could be readily separated without giving it a mutilated appearance, a *bona fide* holder taking it without notice we should consider unaffected by its being so severed and destroyed. See also *Zimmerman v. Rote*, 75 Pa. St., 198, and *Brown v. Reed*, 79 Id., 370.

In *Wait v. Pomeroy*, 20 Mich., 425, a negotiable promissory note was given by the maker for a machine, and below the note a memorandum was written in these words: "If the machine should not be delivered this note not to be paid." The machine was not delivered, but the memorandum was cut off and the note transferred to an innocent purchaser for value before maturity. The court held that a recovery could not be had. It was considered that the memorandum formed a part of the contract, and after it was severed the remainder was no more the contract of the maker than if the very words of the note had been materially changed.

The true rule, stated in a general way, we think, is that where a negotiable note is materially altered it is not valid even in the hands of an innocent purchaser for value before maturity; and that where there is a memorandum or con-

tract written upon the same paper qualifying the terms of the note, and such memorandum or contract is severed, the note is thereby materially altered.

While this is so, we are not prepared to say that under some circumstances the note thus altered by the severance of written qualifying provisions should not be deemed valid. If the maker were guilty of gross carelessness it may be that he ought to be precluded from setting up the invalidity of the note as against a *bona fide* holder for value. This point we do not determine. If a liability in such a case could be declared the general rule would still hold, that a contract cannot be enforced against a person who is not properly a party to it. Where, therefore, an action is brought to enforce a contract against such person we think it incumbent upon the plaintiff to show facts which would take the case out of the general rule. This we think the plaintiff has failed to do. The abstract contains no evidence whatever. There was the fact, to be sure, disclosed by the defendant's answer, that the defendant attached his signature to a paper which contained words and figures constituting a negotiable note, and while the terms of the note were qualified by a contract connected with it upon the same paper, yet that contract was capable of severance. The plaintiff relies upon this fact as showing carelessness. But in our opinion it does not necessarily have that effect. We can conceive that the paper might have presented such an appearance, or that the defendant's signature might have been obtained in such a way, that the mere fact of signing the paper could not be declared to be carelessness.

It is possible that the note and severed contract, or one of them, was introduced in evidence, but the abstract does not so show. The genuineness of the defendant's signature was admitted, which rendered it unnecessary to introduce the note in evidence for any purpose except to show its appearance.

The note is shown to us, and in connection with the note a stipulation is filed to the effect that we may regard the note

Miller v. The Iowa Land Company.

as evidence. Possibly it may be thought that the stipulation would justify us in presuming that the note was introduced below, but we could not entertain such presumption if it should require a reversal, because there is a presumption in favor of the court's ruling, and that presumption is as binding upon us as any other. No evidence of carelessness having been introduced below it appears to us that instruction No. 2, above set out, must be held to be correct.

The case comes within the general rule above enunciated. A very similar case is *Benedict v. Cowden*, 49 N. Y., 396, which was decided upon a full citation of authorities to which we desire to make reference. See, also, as having some bearing, *Kellogg v. Steiner*, 29 Wis., 627, and *Knowville National Bank v. Clark*, 51 Iowa, 264. We see no error, and the judgment is

AFFIRMED.

MILLER ET AL. V. THE IOWA LAND COMPANY ET AL.

1. **Public Lands: CONSTRUCTION OF GRANT: RAILROADS.** *Courtright v. The C. R. & M. E. R. Co.*, 35 Iowa, 386, followed and held decisive of the present case, as to the proper construction of the land grant involved.
2. **Conveyance: VALIDITY OF: TRUSTEES.** Where trustees holding the title to lands for the benefit of a railroad company conveyed certain of the same for their own personal benefit, in payment for their services as such trustees, under authority from the board of directors of the railroad company, it was held that the validity of such conveyance could not be attacked by one claiming the land through a title adverse to that by which it was held by the railroad company.

Appeal from Monona Circuit Court.

THURSDAY, JUNE 16.

THIS is an action involving the title to some twenty-one hundred acres of land situated in Monona county. The

Miller v. The Iowa Land Company.

plaintiffs claim title through the Iowa Central Air Line Railroad Company, under the original land grant act of Congress of May 15, 1856, and the act of the General Assembly of Iowa of July 14, 1856. The defendants claim title under the same acts, and the further acts of the General Assembly of March 17 and 26, 1860, and the act of Congress of June 2, 1864. Upon a trial by the court there was a decree entered for the plaintiffs. Defendants appeal.

Joy & Wright and *E. S. Bailey*, for appellants.

Monk & Selleck, for appellee.

ROTHROCK, J.—I. The acts of Congress and of the General Assembly of the State, under which the respective parties hereto claim title to the land in dispute, have several times been before this court. In the case of *Courtright v. The Cedar Rapids & Missouri River R. Co.*, 35 Iowa, 386, these legislative acts are fully set forth. The various provisions thereof need not, therefore, be repeated here. This controversy involves a part of the same lands, the title to which was determined in that case, to-wit., the one hundred and twenty sections which it was held the Iowa Central Air Line Railroad Company had the right and power to dispose of previous to the construction of any part of its road. It is contended that the sale of the one hundred and twenty sections was made without the knowledge, consent, or subsequent approval of the State, and that the company's board of directors was not authorized to make the selections and sell the land without such approval. But in the *Courtright* case it was determined that no restrictions were imposed by the State upon the right of the company to sell the land, except those imposed by the act of Congress making the grant. It is there said: "Though the grant to the State was absolute, reserving only the power to resume all rights to the lands remaining undisposed of upon failure of the company to complete the road in the

1. PUBLIC
lands: con-
struction of
grant: rail-
roads.

Miller v. The Iowa Land Company.

manner and time provided, yet the conditions and restrictions imposed by the act of Congress upon the State rested upon the railroad company. It took just such a title as the State held and received it burdened with the same conditions and none other. As we have seen, under the acts of Congress the State had power to sell the one hundred and twenty sections of land without any restrictions. The sale of the remainder of the land was restricted. This right and this title the State confirmed and granted to the railroad company. It received an absolute title to the one hundred and twenty sections, and the right to convey the same without restriction. Its title to the remainder of the land was conditional and its power to sell subject to the restrictions above stated." The question as to the power of the railroad company to dispose of the one hundred and twenty sections of land was directly involved in that case. If it had been held that no such power existed, the decision would necessarily have been the other way, because the land, being undisposed of by any proper authority, would have passed to the Cedar Rapids and Missouri River R. Company, the grantor of the defendant, under the subsequent legislation resuming the grant and conferring it upon that company. The Courtright case was appealed to the Supreme Court of the United States, the question therein involving the construction of certain acts of Congress, and the decision of this court was affirmed. 21 Wallace, 310.

II. Having found that the Air Line Railroad Company had the power and authority to sell the one hundred and twenty sections, of which the land in controversy was a part, it only remains to be determined whether a sale thereof was actually made to those under whom the plaintiffs claim, before the act of redemption of March 17, 1860.

It appears in evidence that on the 15th day of March, 1858, the Iowa Central Air Line Railroad Co. executed a deed of trust of certain of the lands included in the grant to J.

2. CONVEY-
ANCE: valid-
ity of: trus-
tees.

Miller v. The Iowa Land Company.

Edgar Thompson, Gilbert H. Smith and N. W. Isbell. This deed is of great length, and is fully set out in the appellees' abstract. It is unnecessary to refer to it at length here. It is sufficient to say that the object of said trust deed was to secure the payment of the bonds and obligations of the company, which might be incurred in the construction of the road. On the 18th day of March, 1858, the said company executed another trust deed upon other lands of the grant to secure the capital stock issued by the company. On November 28, 1859, Thompson, Smith, and Isbell conveyed certain of the lands to M. K. Jessup, and on the same day Joseph P. Eaton, the successor of the said W. H. Gibbs, as trustee, conveyed certain of said trust lands to said Jessup. Afterward, in April, 1861, Jessup conveyed all of the lands which had been conveyed to him to J. Edgar Thompson, under whom the plaintiffs claim by conveyance and by will. The lands conveyed to Jessup, and which plaintiffs claim under him, were part of the one hundred and twenty sections which were selected in advance of building the road.

The Air Line Railroad Co. was largely indebted for grading and other expenditures, and there was a meeting of the creditors of the company with the directors thereof on the 18th day of November, 1859, at which meeting it was agreed the one hundred and twenty sections of land should be divided among the creditors. In pursuance of this arrangement certain bonds and land-scrip were issued in the name of Jessup for said Thompson and Smith, trustees, in payment of their services as such trustees, and upon the surrender of the bonds and scrip the conveyance of the land was made to Jessup for Thompson and Smith. Neither Jessup nor Thompson were present at that meeting; they were represented by Milton Courtright.

It may well be said that the evidence as to what services the trustees rendered, which entitled them to this compensation, is extremely meager and unsatisfactory. It is well established, however, that the bona fide indebtedness of the

Miller v. The Iowa Land Company.

company largely exceeded the value of the one hundred and twenty sections of land, being more than one million dollars, and it may be true that the stockholders of the corporation or its creditors could have, by an appropriate action, canceled the conveyance to Jessup as being fraudulent and without consideration. The conveyance, however, having been authorized by the board of directors, it invested Jessup and Thompson, his grantee, with the legal title to the land, and such title must stand, until set aside by some one holding an equitable right superior thereto. It is claimed that the conveyance by a trustee of the trust property to himself is void. It is voidable as against the *cestui que trust*, but valid as to all other persons. See *Small v. C., R. I. & P. R. Co.*, 55 Iowa, 582.

In our opinion the defendant is in no position to question the sale of that part of the land which the Air Line Company had the undoubted right to sell. The legal title to this land had passed from the railroad company to Jessup before the grant was resumed and conferred upon the defendant's grantors. As well might it have been permitted in the Courtright case to question the validity or amount of the claims which he held against the company as affecting his title to the lands conveyed to him. Besides, suppose it should be conceded that the defendant may avoid the sale for fraud, it must assume the burden of proof, because the conveyance, although made to Jessup by the trustees, for the benefit of the trustees, was an act done in pursuance of direct authority from the board of directors. What services were rendered by the trustees as the consideration for the land does not appear. Whether the claim was a mere sham, or a valid and just one, we are unable to determine from the evidence.

In our opinion the Circuit Court correctly determined that the plaintiffs were the owners of the land in controversy.

AFFIRMED.

FELDENHEIMER v. THE COUNTY OF WOODBURY.

1. **County: LIABILITY FOR JAIL SUPPLIES: SHERIFF.** A sheriff may procure the articles he is required by the statute to furnish for the use of prisoners in his custody on the credit of the county, and the person furnishing the same may maintain an action directly against the county for the purchase price.
2. —: —: —. One so furnishing supplies for prisoners is bound to know that the articles supplied are suitable for the purpose, and possibly that they are necessary, but is not required to determine beyond that whether or not the sheriff has properly exercised the discretion vested in him by the statute.

Appeal from Woodbury Circuit Court.

THURSDAY, JUNE 16.

ACTION upon an account for clothing furnished prisoners confined in the jail of said county at the request of the sheriff. Trial by the court. Judgment for the plaintiff for \$215.80, and defendant appeals.

S. M. Marsh, District Attorney, and George W. Wakefield, for appellant.

Joy & Wright, for appellee.

SEEVERS, J.—I. The Code provides: "The keeper of each jail (sheriff) must furnish necessary clothing, bedding, fuel and medical aid, for all prisoners under his charge, and keep an accurate account of the same. All charges for safe keeping and maintaining convicts and persons charged with public offenses, and committed for examination or trial to the county jail, shall be paid from the county treasury, the accounts therefor being first settled and allowed by the board of supervisors." Code, § 4727, 4735.

It is objected, as the sheriff must furnish the required clothing, that he alone can maintain an action therefor. This view

Feldenheimer v. The County of Woodbury.

would cast upon the sheriff the burden of paying for all the required things mentioned in the statute. We do not believe this is the correct construction. The word furnish should be construed to mean obtain or procure. It cannot be presumed the sheriff is a capitalist, or that his credit is unlimited. The sheriff must obtain what is required from some one, and we cannot see how the county can be prejudiced if it is required to pay such person instead of the sheriff.

II. The defendant sought to prove the sheriff had failed to have washed certain clothing worn by the prisoners. 2. —: —: The evidence was rejected. It is urged it should —: —: have been admitted, because its tendency would have been to show the clothing furnished, or a portion of it, was unnecessary. The claim being that instead of having a shirt washed at an expense of ten cents, a new one was procured at an expense of seventy-five cents or more.

It must be conceded that only necessary clothing can be procured at the expense of the county. The sheriff, however, is made the agent of the county for this purpose. A discretion is reposed in him, and, in the absence of bad faith on the part of the sheriff, and of the person from whom the clothing was obtained, we do not think the discretion reposed in the sheriff can be controlled by the board of supervisors. We can readily conceive of clothing that might be furnished, which would be so manifestly unsuitable as to lead to the conclusion it was unnecessary, and that the same had been procured and furnished in bad faith. In such case, the board of supervisors should refuse to pay therefor.

The plaintiff was bound to know for whom the clothing was desired. He therefore must take notice and determine at his peril whether it was suitable, and, possibly, necessary. There is no pretence the clothing procured of the plaintiff was not of that character, unless it became so because the sheriff had failed to have certain other clothing washed. Now, was the plaintiff bound to inquire whether the sheriff had failed to do his duty in this respect, conceding such was the sheriff's

Forey v. Bigelow.

duty? We think not. The plaintiff was not bound to solve at his peril the legal proposition as to the duty of the sheriff. Nor was he bound to know more than that the clothing was suitable and necessary. Indeed, there are some doubts as to whether he was bound to determine anything more than that it was suitable. We do not think, in view of the discretion reposed in the sheriff, the fact that the sheriff failed to have the prisoners' clothing washed had any tendency to show bad faith on the part of the plaintiff, when there was no evidence tending to show the plaintiff had any knowledge that the sheriff had so failed.

AFFIRMED.

FOREY V. BIGELOW ET AL.

1. **Tax Deed: POSSESSION: STATUTE OF LIMITATIONS.** The cutting of timber and hay from a tract of land by the owner of the patent title, under a claim of exclusive right, constitute such acts of possession as will support a plea of the statute of limitations to an action on a tax deed, executed more than five years prior to the commencement of the action.
2. —: **RECOVERY OF TAXES PAID: SUBSEQUENT PURCHASER.** The holder of a tax deed which fails cannot recover the amount of taxes paid on the property from one who purchased the land subsequent to such payment and without a knowledge thereof.

56	381
82	534
56	381
98	305

Appeal from Chickasaw Circuit Court.

THURSDAY, JUNE 16.

THIS is an action in equity, the object of which is to quiet the title to eighty acres of land, and in case a decree is not rendered quieting the title, plaintiff seeks to recover of defendant certain taxes which he alleges he paid upon the land, and to make said taxes a lien thereon. The plaintiff claims to be the owner of the land by virtue of a tax sale and deed.

The defendant alleges the possession of said land in himself, and his grantors, for more than five years prior to the

 Forey v. Bigelow.

bringing of the action, and pleads the statute of limitations. He also claims that he purchased the land without any knowledge of plaintiff's claim to said taxes, and pleaded the statute of limitations as to taxes paid more than five years prior to the commencement of the action. In addition to the other allegations of the answer, there was a general denial as to the payment of taxes by the plaintiff. The cause was tried to the court, and a decree was entered for the defendant. Plaintiff appeals.

Powers & Kenyon, for appellant.

Gurney & Boylan, for appellee.

ROTHROCK, J.—I. The tax deed under which the plaintiff claims title was executed and delivered to the plaintiff on the 14th day of December, 1869. This action was commenced December 3, 1879. The land was entered by Benjamin Palmer, in 1855. In July, 1856, Palmer quitclaimed the land to H. C. Kimball, which quitclaim was not recorded until September, 1876. The defendant claims title under said Kimball, by several intermediate conveyances; that to defendant having been made by one Hoyt, by special warranty deed, dated in April, 1879.

1. TAX DEED :
possession :
statute of lim-
itations.

The land in controversy has never been inclosed. Between thirty and forty acres of it was timber, and the balance was slough. It appears from the testimony of said H. C. Kimball, who was the only witness examined upon the trial, that from the date of the conveyance to him (1856) until he conveyed to one Cady, in 1876, he exercised exclusive ownership over the land. He further testified as follows: "During the time I claimed the right, and exercised it, to cut the timber on said land to the exclusion of others, and the same was true as to the grass on said premises, and that I did, from year to year, cut for my own use and for sale, and sold to others the right to cut timber from said land until the whole was cut off. I also sold the right to others to cut grass from

 Forey v. Bigelow.

the slough land, and defendant, A. E. Bigelow, has been in possession since his purchase."

It can hardly be claimed that, according to this evidence, Kimball was not in the actual, open and exclusive possession of the land. It presents a strong case of such actual possession and use as the land was adapted to, it being open and uninclosed. That such possession is as effectual, where rights depend upon possession, as an actual inclosure of the land, see *Booth & Graham v. Small*, 25 Iowa, 177; *Clement v. Perry*, 34 Id., 564.

The defendant and those under whom he claims having been in the actual possession of the land from the date of the tax deed, in 1869, up to the commencement of the suit, a period of about ten years, the plaintiff's right to the land is barred by the statute of limitations. *Brown & Sully v. Painter*, 38 Iowa, 456; *Peck v. Sexton & Son*, 41 Id., 566; and other cases since determined by this court.

II. It is claimed that if plaintiff is not entitled to a decree quieting the title to the land in him, that he is entitled to be reimbursed for the taxes on the land which were paid by him. We have frequently held that a recovery for taxes paid upon land is barred in five years. The evidence in this case shows that within five years next preceding the commencement of the action, the plaintiff paid taxes but for one year, and such payment was made on July 9, 1875. It appears that the taxes for the years 1875, 1876, and 1877 were paid by one Wingert, who was at that time the owner of the tax title by a conveyance from the plaintiff. Wingert afterward reconveyed the land to the plaintiff, but there is no evidence whatever that he assigned the claim to be reimbursed for taxes paid by him. But suppose it should be held that the re-conveyance operated as an assignment of this claim to the plaintiff, the plaintiff would probably be entitled to recover for this tax and that paid by him in 1875, under the rule announced in *Sexton v. Henderson*, 45 Iowa, 160, if the party who held the patent title when

2. ———; recovery of taxes paid: subsequent purchaser.

Wangler Bro's v. Black Hawk County.

the taxes were paid was still the owner of the land. But the evidence in this case shows that the defendant, Bigelow, purchased the land and received a special warranty deed from one Hoyt on the 16th day of April, 1879, and there is no evidence whatever that he had any notice that there was any lien in favor of any one upon the land for taxes paid.

Surely, the public records showed no such lien, and if we were to hold that a purchaser of real estate must search the tax books, and stubs of tax receipts, to ascertain if some third person had paid taxes for which there might possibly be a lien, we would be going farther than any case which has come under our observation, and impose a burden on purchasers of real estate which is not warranted by the registry laws, nor by any equitable considerations. In our opinion, the decree of the Circuit Court should be

AFFIRMED.

 WANGLER BRO'S V. BLACK HAWK COUNTY.

1. **Taxation: PERSONALTY: TO WHOM TAXABLE.** Under the statutes of this State personal property is taxable to the person owning the same on the first day of January, and its assessment to one who acquires the ownership between that time and the date when the assessment is made is illegal.
2. —: —: **WHEN IT BECOMES TAXABLE.** Personal property brought into the State after the first day of January is not, under our statute, taxable for that year.

Appeal from Black Hawk District Court.

THURSDAY, JUNE 16.

ON the first day of January, 1878, the plaintiffs were residents of Ohio. On the eleventh day of said month they purchased a stock of goods in Waterloo in this State, and in a few days thereafter they paid for said goods with money

56 384
104 640

56 384
108 387

56 384
115 578

56 384
118 33

56 384
128 233

brought from Ohio. Afterward, during the months of February and March following, they purchased other goods at places out of the State of Iowa and added the same to said stock of goods. On April 1st, 1878, the assessor assessed said stock of goods to the plaintiffs and taxes were levied thereon. This action was brought to enjoin the collection of said taxes. A demurrer to the petition on the ground the plaintiffs "were not entitled to the relief demanded" was overruled, and defendants appeal.

J. L. Husted, for appellants.

Alford & Gates, for appellees.

SEEVERS, J. The amount in controversy being less than one hundred dollars, the trial judge has certified that it is desirable to have the opinion of the Supreme Court upon the following questions:

"1st. Under the statutes of this State, is an assessment of personal property by the assessor, to the party owning the same at the time of the assessment, instead of to the party owning the same on the 1st day of January, an erroneous or an illegal assessment?"

"2d. Is personal property brought into this State after the 1st day of January, by a merchant commencing business here on the 11th day of February of the same year, liable, under the laws of this State, to assessment and taxation in the hands of such merchant?"

It is provided by statute that: "All taxable property shall be taxed each year, and personal property shall be

1. TAXATION: listed and assessed each year in the name of the
personalty: owner thereof on the first day of January."
to whom tax-
able.

Code, § 812.

Counsel for the appellants insist the assessment in question, at most, was erroneous, and therefore a failure to apply to the board of equalization for its correction bars the relief asked. In support of this proposition the rule established in

Linton v. Crosby.

Macklot v. The City of Davenport, 17 Iowa, 379, is invoked. The causes, we think, are distinguishable. Under the statute, as we construe it, personal property must be assessed and taxed in the name of the person owning it on the first day of January of each year. If assessed to any other person than such owner the assessor exceeds his jurisdiction, the assessment is illegal, and so are the taxes levied. In such case the rule in this State is that equity has jurisdiction and injunction is the proper remedy. *Zorger v. The Township of Rapids*, 36 Iowa, 175.

We are unable to conclude there is any substantial difference between § 719 of the Rev. and § 812 of the Code.

2. — : — : This being so, *Tackaberry & Co. v. Keokuk*, 32 Iowa, 155, aids the construction of the statute adopted.

Personal property not in this State on the first of January is not taxable for that year, therefore the second question must be answered in the negative, and the first that the assessment and levy of taxes was illegal.

AFFIRMED.

LINTON V. CROSBY.

11. **Exemption: HEAD OF FAMILY: HUSBAND AND WIFE.** Where a husband and wife, having no children, lived separate and apart for the period of seven years prior to the husband's death, he boarding with others and neither contributing nor being asked to contribute to his wife's support, it was held that he was not at the time of his death the head of a family, within the meaning of the statute exempting personal property from execution.

Appeal from Clayton Circuit Court.

THURSDAY, JUNE 16.

THE defendant is the executor of John Linton and the plaintiff is the widow of the latter. They were married in

Linton v. Crosby.

1861, and lived and cohabited together as man and wife in her house at Garnavillo until the year 1868, when they separated, and have since then lived apart. There was no issue, and Dr. Linton died in 1878. After the separation the plaintiff supported herself from her separate property, and Dr. Linton lodged in his office and was a boarder in the family of others. Previous to his death Dr. Linton disposed of all his property by will, to persons other than the plaintiff.

The latter, claiming Dr. Linton at his death was the head of a family, and the owner of certain personal property which was exempt from execution, presented her petition to the Circuit Court asking the executor be directed to deliver to her said property, or the proceeds thereof, on the ground the title to the same upon the death of Dr. Linton vested in her. The relief asked was denied and the plaintiff appeals.

D. S. Wilson and Murdock & Larkin, for appellants.

L. O. Hatch and Jas. O. Crosby, for appellee.

SEEVERS, J. For the purposes of this case it must be conceded if Dr. Linton at the time he died was the head of a family the property in controversy, or some of it, was exempt from execution during his lifetime.

It is provided by statute: "If the debtor is a resident of this State and is the head of a family" certain personal property named in the statute shall be exempt from execution. Rev., § 3305, Code, § 3072.

"Where the deceased leaves a widow all personal property which, in his hands as the head of the family, would be exempt from execution * * * shall be set apart as her property in her own right and be exempt as in the hands of the decedent." Code, § 2371.

Counsel for appellant has called our attention to several cases determined by this court relating to the homestead and its exemption; the argument being as we understand that under Rev., § 2277, it was the homestead of "every head of

Linton v. Crosby.

a family" that was exempted from judicial sale, and, therefore, as the same language is used in Code, § 3072, the definition or meaning of "the head of the family" as applied to homestead exemptions should be followed in construing the section of the Code under consideration. We are not prepared to assent to this proposition. Both the Rev., § 2278, and Code, § 1989, provide that a "widow or widower, though without children, shall be deemed the head of a family, while continuing to occupy the house used as such (home) at the time of the death of the husband or wife." This statute, creating, as it does, special heads of families, must necessarily have an important bearing in construing the homestead exemption. That whatever construction may have been given to the statute exempting the homestead from judicial sale is not applicable or should not control the statute exempting personal property is well illustrated by *Van Doran v. Marden*, 48 Iowa, 186. In that case certain personal property was exempt from execution in the hands of the plaintiff's first husband and the title thereto vested in the plaintiff as his widow, but it was held not to be exempt after her second marriage, on the ground she was not the head of a family. Now if she had continued to occupy the homestead after the death of her first husband it could not have been sold at judicial sale because of her second marriage. Rev., § 2295, Code, 2007.

We have been called upon several times to construe the statute under consideration. See *Whalen v. Cadman*, 11 Iowa, 226; *Ellsworth v. Ellsworth*, 33 Id., 164; *Scholes v. Murray Iron Works Co.*, 44 Id., 190; *Tyson v. Reynolds*, 52 Id., 431; and *Arnold v. Waltz*, 53 Id., 706. But little aid, however, can be derived from these cases, because the facts upon which they are based are materially different from those in the case at bar.

Counsel for appellant seem to rely largely on *Ellsworth v. Ellsworth*, just cited. The facts in that case were the husband and wife were living together at the death of the former

Linton v. Crosby.

and it was conceded the property in controversy could not "be deemed assets and administered upon as such" unless the rights of the "widow had been abandoned or waived by her conduct or declarations" since her husband's death. The point in *Scholes v. The Murray Iron Works Co.* was as to whether Howard was a resident of the State. There was no controversy as to whether he was a head of a family.

The question in the case before us may be thus stated: When a husband and wife have lived separate and apart for seven years preceding his death, and he neither contributed nor was asked to contribute to her support, and during said time he lodged in his office and boarded in the family of others, was he at the time he died the head of a family within the meaning and intent of the statute? A family is "the collective body of persons who live in a house under one head or manager." Beck, C. J., in *Tyson v. Reynolds*. A person may be the head of a family although he has never been married. Wright, J., in *Whalen v. Cadman*, before cited. The converse of this proposition may also, we think, be true. In the absence of a statute so providing it is difficult to see why a person boarding in the family of others and lodging in his office for seven years can at the expiration of that time be regarded as a family, or the head of one. It is true a person may be a boarder and yet the head of a family. But in order to constitute him such the boarding must be regarded as of a temporary character. It may be if Dr. Linton had contributed to the support of his wife, he, under the statute, was the head of a family. The mere fact he was liable for her support should not, we think, make him the head of a family. No family relation as generally understood existed between himself and wife. The policy and intent of the statute is to exempt certain property because the support of a family, great or small, is cast upon the head thereof. Such family must have an actual existence, as distinguished from one that exists theoretically only.

It may also be if the separation was of a temporary char-

Carpenter v. Zuver.

acter, or there was any evidence of an intent to resume the marital relation, such fact would form an element entitled to consideration. Nothing of this kind appears. On the contrary, but one conclusion can be fairly drawn, and that is the separation was final and so intended to be.

AFFIRMED.

CARPENTER V. ZUVER.

1. **Jurisdiction: CIRCUIT JUDGE: CERTIORARI.** A circuit judge has jurisdiction upon the opening of a term of court to amend or expunge a record entry made by the clerk in vacation, and his action in so doing cannot be reviewed by the Supreme Court on a writ of *certiorari*. The parties to such an entry are deemed in court until a final disposition of it is made.

THURSDAY, JUNE 16.

PROCEEDINGS IN CERTIORARI. At the December term, 1880, of this court the plaintiff made application by petition for a writ of *certiorari*, directed to the Honorable J. R. Zuver, as Judge of the Circuit Court of the county of Lyon, in the 14th Judicial Circuit, commanding and requiring said judge to certify to this court a correct transcript of the record and proceedings in a case of *E. E. Carpenter v. The Sioux City & Pembina Railroad Company*, pertaining to the setting aside by the defendant of a judgment entered therein, and praying that the actings and doings of said defendant in the premises be held void and of no force or effect. On the 11th day of December, 1880, a writ of *certiorari* issued by this court as prayed.

At the April term, 1881, of this court, at Dubuque, the defendant made due return to the writ. The facts are stated in the opinion.

Treadway & Cleland, for plaintiff.

Joy & Wright, for defendant.

56	390
117	290
56	390
142	395

Carpenter v. Zuver.

DAY, J.—On the 28th day of October, 1879, an original notice was issued to the Sioux City & Pembina Railroad Company, that on or before the 1st day of February, 1880, there would be filed in the office of the Clerk of the Circuit Court of Lyon county a petition of plaintiff, claiming of defendant the sum of \$84,620, and that unless defendant appeared thereto and defended before noon of the first day of the next term of said court, commencing on the 17th day of February, 1880, judgment would be rendered as prayed in the petition. This notice was signed by Treadway & Cleland, attorneys for plaintiff, and it was served October 28th, 1879, on the defendant, the Sioux City & Pembina Railroad Company, by reading the same to C. G. Wicker, president of said railroad company.

On the 27th day of January, 1880, the petition of E. E. Carpenter, by his attorneys, Treadway & Cleland, against the Sioux City & Pembina Railroad Company, was filed in said court, claiming of said defendant the sum of \$84,620, and interest from October 28th, 1879. On the 16th day of February, 1880, in vacation, an agreement in said cause was filed in the office of the Clerk of the Lyon Circuit Court, as follows:

“It is hereby agreed by and between E. E. Carpenter, plaintiff in this action, and The Sioux City & Pembina Railroad Company, the defendant herein, pursuant to the provisions of section 2861, of the Code of 1873, that a judgment may be entered in this cause in favor of the plaintiff, E. E. Carpenter, against the defendant, The Sioux City & Pembina Railroad Company, for the sum of eighty-four thousand, six hundred and twenty dollars, and two and $\frac{1}{100}$ dollars costs, and interest on the \$84,620 at six per cent from the 28th day of October, 1879, and it is hereby agreed between plaintiff and the defendant herein that this stipulation and agreement for judgment between the parties hereto is signed by the parties named herein for the purpose of complying with the aforesaid section, and to have the same filed with the clerk of the

1. JURISDIC-
TION: circuit
judge: cer-
tiorari.

Carpenter v. Zuver.

court, as provided in said section, and a judgment entered up in said case by the clerk of said court, as provided in said section 2861.

"Witness the signatures of the parties hereto this 7th day of February, 1880.

E. E. CARPENTER, *Plaintiff*,
THE SIOUX CITY & PEMBINA RAILROAD CO., *Defendant*,
By E. E. CARPENTER, *President*.

Attest: O. C. TREADWAY, *Secretary*.

JOHN M. CARPENTER,
JEROME TILLOTSON,
JOHN M. TREADWAY, } *Directors."*

The clerk, upon the filing of this agreement, spread it upon the record, and made the following entry:

"Now, therefore, it is considered and adjudged that the plaintiff have and recover of said defendant said sum of \$84,620, with interest thereon at the rate of six per cent from October 28th, 1879, with costs herein taxed at \$2.35.

Attest: F. A. KEEP, *Clerk."*

The Lyon Circuit Court convened February 17th. There appeared upon the calendar of said court, among other causes, regularly docketed, the case of E. E. Carpenter, plaintiff, against the Sioux City & Pembina Railroad Company, defendant, with the name of Treadway & Cleland appearing thereon as attorneys for plaintiff, and Joy & Wright as attorneys for defendant. On the opening of the court, the judge directed the clerk to read all the entries made in the record in vacation and that had not theretofore been read, signed or approved. At the said time E. E. Carpenter, plaintiff in said action, J. M. Cleland, a member of the firm of Treadway & Cleland, and C. L. Wright, a member of the firm of Joy & Wright, were present. Among other entries read by the clerk as having been made by him in vacation, was the record purporting to be a judgment entered on the day preceding the opening of said term of court, on a stipulation filed with said

Carpenter v. Zuver.

clerk, made between E. E. Carpenter, as plaintiff, on the one part, and E. E. Carpenter as the President of the Sioux City & Pembina Railroad Company, on the other part. At that time there was on file in said court a petition in said cause, and also an original notice, served on C. G. Wicker, President of the Sioux City & Pembina Railroad Company. After the reading of said vacation entries, C. L. Wright, attorney for said defendant railroad company, requested the defendant, as judge of said court, to defer any action on said vacation entry, and not to approve the same until afternoon, and until said attorney could file a motion and application to set the entry aside. The court granted this request and took no action except to continue the matter until the afternoon. On the reconvening of the court E. E. Carpenter and J. M. Cleland, a member of the firm of Treadway & Cleland, were present. C. L. Wright filed a motion and application in behalf of said Sioux City & Pembina Railroad Company, to set aside said judgment entered in vacation, and moved for a continuance of the hearing of said motion, which motion and application were supported by affidavit. At the same time the defendant, through its attorneys, filed a motion to compel the plaintiff to make his petition more specific. On the following morning, the same parties and attorneys being present, and no objection being made to the continuance of the motion, the same was continued to the next term of court. At the next term of court, which convened on the 5th day of October, 1880, E. E. Carpenter, plaintiff, and O. C. Treadway, of the firm of Treadway & Cleland, were present. Upon the hearing of the application to set aside and cancel said vacation entry evidence was introduced by the defendant showing that at the time the agreement for judgment was signed C. G. Wicker was the president of said company, and that none of the parties signing said agreement ever held any official position in said company. The defendant, as judge of said court, thereupon set aside and canceled said vacation entry. Afterward the defendant's attorney presented and argued

Carpenter v. Zuver.

to said court the motion for a more specific statement in the petition, which the court sustained. The next day, the plaintiff having failed to amend his petition in conformity to the order of the court, his action was dismissed without prejudice.

The writ of *certiorari* may be granted in all cases where an inferior tribunal, board, or officer exercising judicial functions, is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, when in the judgment of the superior court there is no other plain, speedy and adequate remedy. Code, § 3216. The Code, § 177, provides: "Entries authorized to be made in vacation shall be read, approved, and signed at the next term of court, and may be amended, or any entry therein expunged, at any time during the term at which it is made, or before it is signed by the judge." These provisions clearly confer upon the court jurisdiction over its records, and the authority to refuse to approve, and to expunge, improper records. The court did not act without jurisdiction over the subject-matter. It is claimed, however, that no notice was served upon the plaintiff of the filing of the motion to set aside the vacation entry, and that the judge acted without jurisdiction over the person of the plaintiff. The plaintiff was advised by the law that the vacation entry which he had obtained was subject to the action of the court at the next term. He could not place such an entry upon the records and then withdraw from the court, so as to deprive the court of jurisdiction to pass upon the correctness of the entry. For all purposes connected with the approval of the entry he must be regarded as in court, and subject to its jurisdiction, until final action is taken. The return of the defendant shows that both the plaintiff and his attorney were in fact present, although they seem to have taken no part in the proceeding. We are satisfied from the record that the action of the defendant was not without jurisdiction, nor in such sense illegal as to require that it shall be set aside. We refrain from any com-

Hawes v. Miller.

ment upon the conduct of the plaintiff, as disclosed by the record.

The action of the defendant is approved and confirmed.

HAWES ET AL. V. MILLER ET AL.

1. **Election: CONSTRUCTION OF BALLOT: RULES GOVERNING.** The language of a ballot is to be construed in the light of all the facts surrounding the election, and if it expresses the intention of the voter beyond reasonable doubt it is sufficient, though technically inaccurate.
2. ———: **REMOVAL OF COUNTY SEAT: BRIBERY.** Contributions for the erection of county buildings, offered to secure the removal of a county seat, do not constitute bribes which will invalidate an election held to vote on such removal.

56	395
80	635
56	395
88	45
56	395
1133	627

Appeal from Delaware Circuit Court.

THURSDAY, JUNE 16.

ACTION in chancery to set aside and declare void an election held in Delaware county, upon the question of removing the county seat from Delhi to Manchester, at which a majority of the votes were declared by the county canvassers to be in favor of the removal; and to enjoin the supervisors of the county from making any order in pursuance of said action, and to restrain the county officers from removing their offices to Manchester. A preliminary injunction was allowed upon plaintiff's petition. Upon a trial on the merits the preliminary injunction was dissolved and plaintiffs' bill was dismissed; they now appeal to this court. The facts of the case, involved in the question of law decided, are found in the opinion.

J. M. Brayton and E. C. Perkins, for appellants.

Shiras, Van Duzee & Henderson, for appellees.

Hawes v. Miller.

BECK, J.—I. There is no dispute as to the facts of the case, and but two questions of law are presented for our determination. It becomes unnecessary to state the facts or recite the pleadings further than they are involved in these questions.

A vote was ordered at a general election upon the question of the removal of the county seat of Delaware county from Delhi, then the county seat, to Manchester. The proclamation for the election, authorized by the statute, stated the question to be voted on in this language: "Shall the county seat of Delaware county, Iowa, be relocated from Delhi to Manchester?" The election was regularly held, and it was found by the supervisors, upon canvassing the votes, that a majority of more than five hundred was in favor of removing the county seat to Manchester, and the canvass and result was so entered upon the proper record. The ballots cast were of the following different forms:

1st. "For the county seat, Delhi. For the county seat, Manchester."

2d. "Shall the county seat of Delaware county, Iowa, be relocated from Delhi to Manchester? Yes." "Shall the county seat of Delaware county, Iowa, be relocated from Delhi to Manchester? No."

Of the ballots of the first form 1446 were cast for "Delhi" and 430 were for "Manchester." Of the ballots of the second form there were 127 "no" and 1698 "yes."

II. Counsel insist that the ballots in the second form are not in conformity with the statute, and should have been rejected. Code, § 286, referring to county seat elections, provides that "the ballot shall state that it was cast for the county seat, and name the place voted for."

1. ELECTION:
construction
of ballot:
rules govern-
ing.

These county seat elections are governed by the same rules that are applicable to the election of officers. In canvassing votes of electors their intentions must be ascertained from their ballots, which must be counted to accord with such in-

Hawes v. Miller.

tentions. If the ballots express such intentions beyond a reasonable doubt it is sufficient, without regard to technical inaccuracies, or the form adopted by the voter to express his intentions. Of course the language of a ballot is to be construed in the light of all facts connected with the election; thus, the office to be filled, the names of the candidates voted for, or the subject contemplated in the proposition submitted to the electors, and the like, may be considered to aid in discovering the intentions of the voter. *State v. Cavers*, 22 Iowa, 343; *Cattell v. Lowry et al.*, 45 Iowa, 478; *Carpenter v. Ely*, 4 Wis., 438; *The People v. Matteson*, 17 Ill., 167; *The People v. McManus*, 34 Barb., 620; *The State, ex rel., v. Elwood*, 12 Wis., 552; *Railroad Co. v. Bearss*, 39 Ind., 600; *State, ex rel. Phelps, v. Goldthwaite*, 16 Wis., 146.

Under these rules the ballots of both forms are to be regarded as sufficient in themselves to indicate unmistakably the intentions of the voters. If they differ in explicitness we think the last form is plainer than the first. It clearly shows that the ballot "was cast for the county seat, and the name of the place voted for." It complies with Code, § 286, above cited.

III. It is alleged in the petition and admitted by the answer that a number of citizens of Manchester, who had signed the petition for the relocation of the county seat, before the election executed and filed in the office of the county auditor a bond obligating themselves to remove the jail from Delhi to Manchester, purchase and convey to the county an eligible site for the jail and county buildings, to furnish and lease to the county for ninety-nine years the town hall, and to furnish to the county four sufficient rooms with fire proof vaults, all free of expense to the county, within thirty days after the canvassing of the vote, if it should be for the relocation of the county seat. It is also shown that by ordinance of the town of Manchester the town hall was offered for the use of the county in

2. ———; removal of county seat: bribery.

Hawes v. Miller.

case the county seat should be established in that town. The bond and ordinance were published in the county newspapers, and circulars reciting them were sent to the voters of the county. The petition alleges that the number of electors who were influenced to vote for the relocation by these inducements, offered by the town and citizens of Manchester, exceeds the majority which the proposition received. There are no admissions or evidence upon these allegations of the petition. That the proposition had an effect upon the election cannot be doubted, and, for the purposes of the case, it may be admitted that it was as great as is alleged in the petition.

It is claimed by plaintiffs that the proposition of the citizens and town of Manchester, to furnish free of expense county buildings, was a bribe offered to the electors of the county to induce them to vote for the relocation of the county seat, which defeats the election. The question of law here presented now demands our attention.

To provide suitable buildings for county purposes at the county seat requires considerable outlay of money. This fact often possesses controlling influence in the location of county seats. It has often occurred that county seats have been located or relocated upon the ground that county buildings were supplied by the citizens of the town where the county seat is fixed by the vote of the people. The question of location of county seats involves matters of convenience and expense to the whole county. It may be inconveniently located, yet the people would endure the inconvenience rather than incur the expense of erecting new county buildings at another place. If the obstacle of expense be removed the electors would vote for a change. We see nothing like bribery in this. This precise question was before the court in *Dishon v. Smith*, 10 Iowa, 212, and it was decided that contributions in land and money to be used for county purposes in consideration of the location of the county seat does not amount to bribery.

Carrothers v. Russell, 53 Iowa, 346, is distinguishable

Hawes v. Miller.

from the case before us. In that case we held that a candidate for a public office, who for the purpose of influencing the voters made the pledge to pay into the treasury of the county all fees received by him in excess of a certain annual salary, is guilty of offering a bribe to the voters, and is thereby disqualified to hold the office to which he was elected. The distinctions between that case and the one before us are well stated by Lyon, J., in the *State v. Purdy*, 36 Wis., 224, in the following language: "The distinction between the election of public officers, to whom, for the time being, the exercise of the functions of sovereignty is entrusted, and the mere choice of a site for a public building, is quite apparent. The former involves, or may involve, the integrity of the government and the preservation of the principles upon which it is founded, while the latter is only a matter of public convenience or pecuniary interest, involving no fundamental principle whatever."

We adopt this language, and think it leaves nothing to be said in order to distinguish *Carrothers v. Russell* from the case before us.

No questions are discussed by counsel other than those we have considered.

It is our opinion that the judgment of the Circuit Court ought to be affirmed.

AFFIRMED.

GLADE V. THE GERMANIA FIRE INS. CO. ET AL.

1. **Insurance: MISREPRESENTATION IN APPLICATION: INCUMBRANCES.**

A statement in an application for insurance that the amount of incumbrance on the property was about three thousand dollars, when in fact it exceeded four thousand four hundred dollars, was held to constitute a material misrepresentation, which would defeat a recovery on the policy issued on such application, without regard to the good faith in which the statement was made.

Appeal from Jackson District Court.

FRIDAY, JUNE 17.

ACTION upon a joint policy of fire insurance made to the plaintiff by the defendants, the Germania Fire Ins. Co. and the Hanover Fire Ins. Co. The defendants, for answer, admit the issuance of the policy, and the destruction by fire of the property insured, but they aver that the plaintiff fraudulently caused the property to be burned. They further aver that in the application upon which the policy was issued the plaintiff, in answer to a question as to the amount of a mortgage upon the property, stated that it was \$3,000, whereas it in fact largely exceeded that sum. There was a trial by jury, and a verdict and judgment were rendered for the plaintiff. The defendants appeal.

Aylett R. Cotton, for appellants.

S. S. Simpson and *L. A. Ellis*, for appellee.

ADAMS, CH. J.—The mortgage upon the property, it appears, amounted to \$4,425, being \$1,425 more than the

1. **INSURANCE:** amount stated in the application. The defendants
misrepresen- asked an instruction in these words: "If the jury
-tation in ap-
-plication: in-
-cumberance. believe from the evidence that at the time the
plaintiff was procuring the policy of insurance on which this
suit is founded he represented to the defendants that a mort-

gage on the property which is insured under said policy then amounted to about \$3,000, and that the defendants relying upon such representation issued said policy, and if the jury further believe from the evidence that the amount of said mortgage at the time said representation was made amounted to much more than \$3,000, and then amounted to the sum of \$4,000 and more, the plaintiff will not be entitled to recover in this action for the loss on the property thus encumbered by said mortgage, although the plaintiff, when he made said statement, may have believed that the amount of said mortgage was then only about \$3,000." This instruction the court refused to give, and the defendants assign the refusal as error.

The statement in the application in regard to the amount of the mortgage is unqualified. The amount is stated absolutely as \$3,000. But there was evidence tending to show that the plaintiff did not claim to know the precise amount, and was told by the agent to make an approximate statement of the amount, and that the statement made was made under such direction. It is claimed by the plaintiff, therefore, that while the application shows an unqualified statement, he should not be bound by it as such by reason of the direction under which it was made.

Where a statement is written down by the agent precisely as it is given, there is some doubt as to whether the insured can be permitted to show that he intended something different.

But the instruction which the defendants asked assumes that the statement may be taken as intended to be only an approximate statement, and be read as if the plaintiff had said that the mortgage amounted to *about* \$3,000. The plaintiff does not, and cannot properly, claim more than that. For the purposes of the opinion, then, we shall treat the case precisely as if the statement had been that the mortgage amounted to *about* \$3,000. The question then arises as to whether the plaintiff was bound even by that statement, unless he was

Glade v. The Germania Fire Ins. Co.

guilty of bad faith. The court seems to have thought that he was not. This is shown not only by the instruction which was refused, but by an instruction given by the court upon its own motion, in which the court held that the misrepresentation would not avoid the policy unless made willfully and designedly.

Before proceeding to the consideration of this question, we will say that we think that there can be no pretense that it was true (as we assume it to be stated) that the mortgage amounted to only about \$3,000, or that the statement was approximately correct. The difference between \$3,000 and \$4,425 is nearly fifty per cent. It would be trifling with language to say that \$3,000 is about \$4,425, or is approximately that sum.

In *Hayward v. The New England Mutual Fire Ins. Co.*, 10 Cush., 444, the statement was that the mortgage was about \$3,000. It proved to have been \$4,000. It was held that there was a misrepresentation which avoided the policy. The court said: "It seems to us quite too clear to admit of a doubt that the answer given by the plaintiff in his application to the inquiry respecting incumbrances was materially false. Making all due allowances for the loose manner in which such documents are often prepared, and giving the plaintiff the full benefit of the word *about* as qualifying and limiting his answer, it cannot in any view be deemed to be substantially true. To hold so wide a deviation from the fact to be immaterial would be to defeat the very purpose which the questions and answers in the application were intended to accomplish, and render them but a vain and idle ceremony."

In *Brown v. Peoples Mutual Ins. Co.*, 11 Cush., 280, the statement was that the mortgage was about \$4,000. It amounted, in fact, with accumulated interest, to a little less than \$4,900. It was held that there was a misrepresentation which avoided the policy. But in neither of those cases was the difference between the amount stated and the true amount as great as in the case at bar.

It is true that in the case at bar the difference was made up to a considerable extent of accumulated interest. But that is immaterial. What the companies were entitled to know was whether the property was imperiled by an incumbrance, because such property does not constitute as desirable a subject of insurance. If it was imperiled, it was of no consequence that the peril resulted largely from accumulated interest, unless we may say that a large accumulation of interest would tend rather more clearly to indicate that the insured was in a desperate condition. We come, then, to the conclusion that under the facts shown and the cases cited there was clearly a misrepresentation in a material matter. The next question is as to whether the misrepresentation had the effect to avoid the policy. It appears to us that it had. We can hardly conceive, indeed, that such a misrepresentation could have been other than the result of bad faith, and not of mere ignorance; but in our opinion it was wholly immaterial as to whether it was or not. It is very common, we believe, in making answers which are to become representations in applications for insurance, whether fire or life, to qualify the answers by the use of the word *about*. It doubtless often happens that no other than such qualified answer can properly be given. We have never heard it suggested before that the applicant in making such answers is bound to no accuracy or truthfulness whatever, provided only he does not act in bad faith. When an applicant gives a qualified answer, he virtually declines to give an unqualified answer, and in so doing he virtually declares that his information is not such as to justify him in giving an unqualified answer. But while this is so he must be understood as declaring that his information is such as to justify him in giving the qualified answer which he does give.

If the fact was that the plaintiff did know even *about* how much the mortgage on his property was he should have declined to make any answer at all until he had ascertained. The companies had a right to be correctly informed, because

The State v. Heisey.

the information sought was to be made the basis of their action; and this the plaintiff knew from the fact that he was inquired of concerning the amount of the mortgage.

In our opinion the instruction asked by the defendant should have been given.

A large number of errors was assigned, but it is unnecessary that we should extend this opinion by the consideration of them farther than we have gone. The ground upon which we have disposed of the case renders it improbable that the questions not noticed will arise upon another trial.

REVERSED.

THE STATE V. HEISEY ET AL.

1. **Official Bond: WHEN NOT REQUIRED:** WARDEN OF ADDITIONAL PENITENTIARY. The warden of the additional penitentiary at Anamosa, whose duties are defined by the statute to be the same as those prescribed for the warden of the penitentiary at Fort Madison, so far as applicable, is not required thereby to execute a bond, that given by the warden at Fort Madison being required before he enters upon his office and not as an official duty.
2. —: —: **EFFECT OF.** Where a public officer executes an official bond which is not required by the statute such bond is void for want of consideration.

Appeal from Jones District Court.

FRIDAY, JUNE 17.

ACTION on a bond executed by the defendant Heisey as principal and the other defendants as his sureties conditioned that said Heisey would faithfully perform in accordance with law the duties of warden of the additional penitentiary at Anamosa, to which office he had been duly elected. A breach of the conditions of the bond was alleged in the petition. In an amended answer the defendants pleaded that Heisey was

The State v. Heisey.

not required by law to give a bond, and the one sued on was therefore void. The District Court so held and judgment was rendered for the defendants. The State appeals.

Smith McPherson, Attorney General, for the State.

Remley & Ercanbrack, and *M. Remley*, for appellees.

SEEVERS, J.—The additional penitentiary at Anamosa was established by an act of the General Assembly passed in 1872. Three commissioners were appointed to carry out the provisions of the act. They were authorized to elect a warden whose duties and powers were declared to be the “same as prescribed by law for the penitentiary at Fort Madison so far as practicable.” Chapter 43, Acts of the Fourteenth General Assembly.

1. OFFICIAL
bond : when
not required :
warden of
additional
penitentiary.

The Attorney General does not claim there is any statutory provision which in express terms required the defendant Heisey to give the bond in question. But he insists as the duties were the same as the warden of the penitentiary at Fort Madison such bond was required because it was the duty of the warden at Fort Madison to give a bond.

Section 4747 of the Code provides in relation to the warden at Fort Madison that: “Before entering upon the discharge of his duty he shall execute a bond.” In no just sense can it be said an act which is required to be done in order to qualify a person to discharge the duties of an office is an official duty pertaining to the office. The person elected warden at Fort Madison did not become such until he had given the bond required by law. When this was done he became warden, and it was only the official duties of warden Heisey was by the statute required to perform. The bond in question, not having been required by statute, cannot be enforced as a statutory bond.

II. The Attorney General further insists the bond is a

The State v. Helsey.

valid obligation at common law, and in support of this position he relies on *Sheppard & Morgan v. Collins*, 2. —; —: effect of. 12 Iowa, 570; *Garretson v. Reeder*, 23 Id., 21; and *The Postmaster General v. Early*, 12 Wheaton, 136. The two former actions were brought on delivery bonds executed to the sheriff for the return or delivery to him of property he under process had attached. Such bonds were expressly authorized by statute and those in question were merely defective in that the conditions required by statute were not contained in them. In this respect the cases are distinguishable from the one at bar in two important particulars. 1st. As has been said the bonds were authorized by statute and were defective only; and 2d. There was a sufficient consideration because by reason of their execution the sheriff delivered to the obligors the attached property. The question in the last case which can be regarded as an authority in the case before us was "whether under a fair construction of the acts of Congress the Postmaster General may take bonds to secure the payment of money due or which may become due to the general postoffice" and it was held the bond sued on was authorized by the acts of Congress. In the present case Helsey received nothing by reason of the execution of the bond. No benefit or advantage was conferred on him because of its execution. It must, therefore, be regarded as having been voluntarily executed, and as there was no consideration therefor, it cannot be enforced. *The State v. Bartlett*, 30 Miss., 624.

AFFIRMED.

SQUIER ET AL V. PARKS ET AL.

1. **Mechanic's Lien:** STATUTE OF LIMITATIONS: WHEN IT BEGINS TO RUN. Section 2529 of the Code, in fixing the time within which an action to enforce a mechanic's lien may be brought, has reference to the thirty or ninety days allowed for the filing of claims by sub-contractors and contractors respectively under the mechanic's lien law, and the statute begins to run against an action at the expiration of such time, if the claim is not sooner filed.

Appeal from Taylor District Court.

FRIDAY, JUNE 17.

THE plaintiffs bring this action to recover the amount of five promissory notes, executed by the defendant, William C. Parks, to the plaintiffs, and to foreclose a mortgage, executed to secure said notes, dated May 7th, 1875. The defendants, Goodsill Brothers, Anderson & Company, on the 18th day of February, 1880, filed an answer and cross bill for the foreclosure of a mechanic's lien, filed on the first day of October, 1879, for lumber furnished to make improvements on the mortgaged premises, the last item of account being furnished November 17th, 1876. The defendants ask that the mechanic's lien be foreclosed and be declared superior to the lien of the plaintiffs' mortgage as to the building and improvements. The plaintiffs demurred to the answer and cross bill as follows:

"1. That the cause of action as sought to be brought by the defendants shows on its face that it is barred by the statute of limitations, in this, that the date of the last item in said account was November 17th, 1876, and that was over three years before the action was commenced.

"2. That it is true that the said lien was filed within two years last past, viz: on October 1st, 1879, but the statute of limitations cannot be prolonged by the act of the plaintiff.

"3. That having had two years to bring their action and

56	407
83	433
56	407
84	604
56	407
92	431
56	407
102	215
56	407
106	607

Squier v. Parks.

foreclose their lien, and failing to do so, the action is fully barred."

This demurrer was overruled. The plaintiffs refusing to further plead, a decree was entered against them in favor of Goodsill Brothers, Anderson & Co., as prayed in their cross-bill. The plaintiffs appeal.

Crum & Haddock, for the appellants.

Lyman Evans, for Goodsill Bros., Anderson & Co.

DAY, J.—Section 2133 of the Code provides that a verified statement of the account, and description of the property to be charged with the lien, shall be filed with the Clerk of the District Court, by a principal contractor within ninety days, and by a sub-contractor within thirty days from the date of furnishing the last of the material or performing the last of the labor. It is further provided that a failure to file the statement within the time prescribed shall not defeat the lien, except as against purchasers or incumbrancers in good faith, whose right accrued after the thirty or ninety days, and before any claim for the lien was filed. The mortgage to plaintiff was not executed after ninety days from the furnishing of the last item of account and before the statement for a lien was filed. The plaintiffs, therefore, are not entitled to protection as incumbrancers under the provisions of section 2133 above referred to. The cross-bill to foreclose the lien was filed about four and one-half months after the statement for the lien was filed, but the statement for the lien was not filed until nearly three years after the last item of account was furnished. Section 2529 of the Code provides that actions to enforce a mechanic's lien must be brought within two years from the time of filing the statement in the clerk's office. The question involved in the case is the following: "Under section 2529 of the Code, may an action to enforce a mechanic's lien be brought within two years from the time of filing the state-

1. MECHANIC'S
LIEN: statute
of limita-
tions: when it
begins to run.

Squier v. Parks.

ment in the clerk's office, although such statement be not filed until after the expiration of ninety days from the furnishing of the last item of the account." In order to a correct determination of this question sections 2133 and 2529 must be construed together, and as limiting and qualifying each other. For, if they are to be construed independently of each other, the claim for a lien, where no intermediate purchasers or incumbrancers are concerned, may be filed at any time, and the action brought within two years thereafter, thus enabling a party at pleasure to make the statute of limitations for the foreclosure of a mechanic's lien coextensive with the statute of limitations upon an open account. Besides, we have held that as between the contractor and the owner the lien exists and may be enforced without the filing of any statement for a lien. See *Neilson v. Iowa Eastern R'y Co.*, 51 Iowa, 184. If the statute of limitations begins to run from the actual filing of the lien, it follows that, as between the contractor and the owner, the contractor can always bring about a condition in which there will be no statute of limitations for the foreclosure and enforcement of his lien, by simply neglecting to file a statement for a lien, and can always bring his action under the general statute of limitations. Section 2133 of the Code fixes a definite time for the filing of a statement for a lien. The definite time thus fixed is in the case of a principal contractor ninety days, and of a sub-contractor thirty days, from the last item of account. We think section 2529 of the Code in prescribing the period of limitation has reference to the definite time thus established. The statement may be filed at any subsequent time, if no rights of third parties intervene, provided it is filed so that an action to enforce it may be brought within two years from the definite time of thirty or ninety days from the last item of account, from which time the statute begins to run if no statement is filed within that time.

This very question, as we understand, was determined in *Gilcrest v. Gottschalk*, 39 Iowa, 311. For, whilst it is true

the action to foreclose the lien was not brought until after the expiration of nine months from the time of filing the first statement for a lien, yet another statement for a lien was filed, and the action was brought within nine months of that time. No inquiry was made as to the right to file a second statement for a lien, but the decision was placed upon the broad ground that a party cannot extend the statute of limitation, by neglecting to file his lien within the thirty or ninety days prescribed. The determination in *Hintrager v. Hennessy*, 46 Iowa, 600, is also in harmony with our conclusion in this case. In that case it was held that a party could not prevent the running of the statute of limitations for the recovery of land sold at tax sale, by neglecting to take a deed when he became entitled to it.

The demurrer to the defendants' cross-bill should have been sustained.

REVERSED.

THE COUNTY OF POTTAWATTAMIE V. THE COUNTY OF MARSHALL.

1. **Practice:** CANCELLATION OF JUDGMENT. A judgment or order of court will not be set aside or modified unless affirmative and prejudicial error is shown therein.

Appeal from Marshall District Court.

FRIDAY, JUNE 17.

It appears from the averments of the petition in this case that the plaintiff commenced an action against the defendant to determine the legal settlement of an insane pauper and to recover for the expense incurred by plaintiff in the support of said pauper in the hospital for the insane at Mount Pleasant. The original notice was entitled in the Circuit Court,

 County of Pottawattamie v. County of Marshall.

but the petition by the mistake of the draughtsman thereof was entitled in the District Court. The clerk of the court filed the papers in the District Court, and the attorney of the plaintiff being a resident of Pottawattamie county, in the belief that the cause was pending in the Circuit Court did not attend the next term of the District Court. The attorney of the defendant appeared and filed a demurrer to the petition which was sustained, and an entry of an exception to the ruling was made by the court in behalf of the plaintiff. Afterwards the entry of the exception was set aside because no exception was in fact taken.

The plaintiff's attorney having ascertained that the case was filed in the District Court, and that the said orders had been made, filed the petition herein averring that the failure to appear in said court was the result of unavoidable casualty and misfortune, and that the court had no jurisdiction in said cause nor any authority to make any order therein, and that the court erred in denying plaintiff the benefit of an exception to the ruling on the demurrer.

The prayer of the petition is that the orders made by the District Court may be vacated and set aside, and that said cause be dismissed, or that said order setting aside the exception to the ruling on the demurrer be vacated. Upon a trial the prayer of the petition was denied. Plaintiff appeals.

Jacob Sims, for appellant.

O. Caswell, for appellee.

ROTHROCK, J.—It is contended by counsel for appellant that the District Court had no jurisdiction of the subject matter of the action, but that under the provisions of

1. PRACTICE: of judgment. Sec. 1359 of the Code, the Circuit Court had exclusive jurisdiction. If this view be correct the plaintiff cannot be prejudiced by the ruling on the demurrer because such ruling was absolutely void and determined no right.

 Kerndt & Bros. v. Porterfield.

But we need not determine that question in this case. The petition which prays a modification of the judgment on the demurrer does not set forth the original cause of action, and the record nowhere discloses the grounds of the demurrer. For aught that appears it may have been based upon the want of jurisdiction of the court over the subject matter of the action. Or the original petition may have been vulnerable to a demurrer in any court having jurisdiction upon other grounds. The ruling upon the demurrer determined that the plaintiff did not present a good cause of action. It is averred in general terms in the petition for a modification of the judgement that the original petition did contain a good cause of action in the Circuit Court. This we are unable to determine because the record does not set out the original petition. Error must affirmatively appear.

AFFIRMED.

KERNDT & BROS. v. PORTERFIELD ET AL.

1. **Mortgage: STATUTE OF LIMITATIONS: PRIORITY OF LIENS.** A note and mortgage which have become barred by the statute of limitations may be revived by an admission of indebtedness by the mortgagors, and the priority of the mortgage lien will thereby be preserved as against subsequent liens, taken before the mortgage became barred and not foreclosed until after it is revived. *Day v. Baldwin*, 34 Iowa, 380, distinguished.

Appeal from Allamakee District Court.

FRIDAY, JUNE 17.

ACTION in chancery to foreclose a mortgage executed by defendants Porterfield and wife. A decree was entered declaring plaintiff's mortgage junior to a mortgage under which one of the other defendants claims. Plaintiffs appeal. The facts of the case are stated in the opinion.

56	412
93	877
56	412
97	473
99	611
56	412
124	379
56	412
137	346
56	412
138	621

Dayton & Dayton and L. E. Fellows, for appellants.

H. H. Stilwell, for appellees.

BECK, J.—I. The promissory note secured by the mortgage, which plaintiffs seek to foreclose, was executed October 20th, 1865, and was due three years after date. The petition shows that the mortgagors executed a written promise to pay the debt, thereby reviving it, on the 22d day of January, 1879. C. O. Howard is made a defendant, the petition alleging that he has or claims to have a lien or interest in the property covered by the mortgage, inferior and subject to plaintiffs' mortgage.

Howard in his answer alleges that Porterfield and wife, on the 6th day of August, 1875, executed to him a mortgage upon the property involved in this action to secure two promissory notes made upon the same day, and that in February, 1879, he recovered a decree under which the property was sold on execution, May 10, 1879, and a sheriff's deed was executed to him on the 22d day of November, 1880. It is alleged and claimed in the answer that, as more than ten years had expired after the maturity of plaintiffs' note when it was revived by the new promise of payment, the mortgage became and was barred as against Howard and the rights he acquired under his mortgage.

Plaintiffs demurred to Howard's answer on the ground that it does not set up a sufficient defense to the action. The demurrer was overruled and thereupon a decree was entered declaring plaintiffs' mortgage to be inferior to Howard's title acquired under his mortgage.

II. The question presented by the case is this: Did the new promise of Porterfield remove the bar of the statute of limitations as against Howard, so that plaintiffs' mortgage may be enforced as a prior lien on the property?

1. MORTGAGE:
statute of limitations;
priority of liens.

Kerndt & Bros. v. Porterfield.

It will be observed that Howard's mortgage was executed before the expiration of ten years from the maturity of plaintiffs' note secured by his mortgage; that the new promise was made after the expiration of that time, and that the foreclosure of Howard's mortgage and the sheriff's sale and deed were after the new promise reviving the debt due to plaintiffs. Will the new promise revive the mortgage as against the junior mortgage, executed before the period of limitation had run against the senior mortgage?

An action to foreclose a mortgage is not barred by the statute of limitations so long as the debt remains unpaid and capable of being enforced. *Brown v. Rockhold*, 49 Iowa, 282; *Clinton County v. Cox*, 37 Iowa, 570. The mortgage is an incident of the debt and follows it, and its existence as a lien is only terminated when the debt ceases to be enforceable.

As between the mortgagor and mortgagee it cannot be doubted that a new promise which is sufficient to revive the debt will also revive the mortgage. It seems that the same rule ought to prevail against all persons interested in the mortgaged property unless there exist reasons which in equity would render it unconscionable to enforce the mortgage lien as against their interest. If such a rule did not prevail the mortgage would not continue as long as the debt existed, and the mortgagee would be deprived of the security provided for the debt. We think, however, that equities may arise which would defeat or suspend the lien in order to protect the interest of others. It may be, but the point we do not decide, that one acquiring an interest in mortgaged property after foreclosure of the mortgage is barred by the statute, and before a new promise is made, would hold by a right superior to the mortgagee after his debt is revived by a new promise. But the case is different where one acquires such an interest before the action upon the mortgage is barred, and after the period of limitation has run the debt is revived by a new

promise. In such a case the debt was enforceable when the interest of the adverse claimant was acquired with full notice of the mortgage lien. When his interest was acquired, he took it subject to the mortgage, with the knowledge that the debt could be revived by a new promise and the mortgage lien would stand as long as the debt existed. When the mortgage is foreclosed under a new promise removing the bar of the statute, he is in no different condition than he was in when he acquired his interest. If he was satisfied to acquire his interest while it was subject to the mortgage, he ought to be content to hold it in that condition. He can urge no equity which will relieve his property from the lien of the mortgage. *Waterson v. Kirkwood*, 17 Kan., 9; *Schumaker v. Sibert*, 18 Kan., 104. See *Mahon v. Cooley*, 36 Iowa, 479. It seems that a different rule is recognized in California. See *Wood v. Goodfellow*, 43 Cal., 185.

III. *Day v. Baldwin*, 34 Iowa, 380, is relied upon by defendant's counsel to support a different view. Its decision is based upon other principles than those which prevail in this case.

In that case the mortgagee by his admissions in his answer to the action to foreclose removed the bar of the statute. This we held he could not do so as to affect the interest of his co-defendant, for the reason that he had no interest in the property and was not a necessary party to the action, and by his pleadings did not show that he was even a proper party. It further appears that the admissions in the pleadings which removed the bar of the statute were made after the adverse title had been fully perfected and vested in the claimant. In the case before us it is not disputed that the mortgagees were authorized to make the written admission of the debt, and it is shown that Howard's title under which he claims was perfected after the admissions were made. The equities which, in that case, we held would not permit the removal of the bar of the statute, are not found in the record before us.

 Bixby v. Blair & Company.

It is our opinion that the District Court erred in overruling plaintiffs' demurrers to the answer of defendant Howard. Its judgment, therefore, will be reversed and the cause will be remanded for a decree in accord with this opinion.

REVERSED.

 BIXBY V. BLAIR & COMPANY ET AL.

56	416
121	552
56	416
132	108

1. **Practice: APPEAL: WAIVER OF.** One who after the overruling of his application to be substituted as a party to an action amends his application, which is then granted, by his amendment waives his right of appeal from the former ruling.
2. ———: **ACTION AGAINST SHERIFF: SUBSTITUTION OF DEFENDANTS.** In an action against a sheriff to recover property taken by him under process, a joint application by the sheriff and the person in whose favor the process issued, to have the latter substituted as defendant, may be made at any time, although an answer has been previously filed by the sheriff.
3. ———: **REMOVAL OF CAUSES.** In passing upon an application for the removal of a cause to the federal courts the affidavits accompanying the petition for removal should be considered as a part thereof, and the decision should be based on the facts shown by the whole record.

Appeal from Fayette Circuit Court.

FRIDAY, JUNE 17.

THE plaintiff commenced this action in replevin to recover of the defendant L. L. Farr, sheriff of Fayette county, a stock of goods and merchandise of the alleged value of \$1,600, which it is averred is the absolute property of the plaintiff, and upon which the said Farr as sheriff wrongfully levied an attachment issued from the Superior Court of Cedar Rapids, in an action by William Blair & Company against one Billings. The petition demands the return of the property, or in case the same cannot be found, judgment for the value thereof, and for damages for said wrongful taking and detention. The

Bixby v. Blair & Company.

petition also sets out the names of the sureties upon the official bond of the said sheriff, and exhibits a copy of the bond, but no original notice was served upon said sureties.

The defendant Farr appeared to the action, and on the 1st day of December, 1879, he filed his answer in which he claimed that he made the levy upon the property by virtue of a writ of attachment at the suit of William Blair & Company, against J. R. Billings, and that Billings was the owner of the goods, and that for the purpose of hindering, delaying and defrauding said Blair & Company, and other creditors, he made a sham sale thereof to the plaintiff, who made the pretended purchase with the intent to assist Billings in said fraud.

On December 3, 1879, the defendant Farr moved the court to substitute William Blair & Company as defendants in the action, and with his motion he exhibited the writ of attachment under which the levy was made, and filed his affidavit setting forth the facts as to the levy and the names of the real parties in interest. On the next day the said William Blair & Company, in the individual names of their partnership firm, made their application to be substituted as defendants, setting forth facts showing that the property in controversy was seized at the suit of said partnership firm. At the same time Blair & Company filed a bond for costs in the penalty of \$250. These applications for substitution were overruled, to which ruling the defendants excepted. Afterward an amended application for the substitution of William Blair & Company was made jointly by Farr and William Blair & Company, and accompanied with an additional bond in the penalty of \$500, conditioned for the payment of any judgment for costs or damages that might be rendered against William Blair & Company in said action. Thereupon the motion for substitution of parties defendant was sustained. To this ruling of the court the plaintiff excepted.

On the same day that the order of substitution was made, the defendants William Blair & Company filed their answer, in which they made substantially the same averments as were

Bixby v. Blair & Company.

made in the answer of Farr, and thereupon the defendants filed a petition, affidavit and bond for the removal of the cause to the Circuit Court of the United States. The plaintiff filed objections to said petition, and the application to transfer the cause was denied, to which ruling the defendants excepted.

Thereupon the cause was submitted to the court, and judgment was rendered finding the plaintiff to be the owner of the property, and awarding him the possession thereof, and for costs.

Defendants appeal from the judgment, and from the order overruling the application for change of forum, and the plaintiff appeals from the order of substitution of the parties defendant. The defendants first appealed, and should, therefore, be designated herein as appellants.

Hubbard & Clark and *F. M. Dawley*, for appellants.

Rickel, West & Eastman and *D. W. Clements*, for appellee.

ROTHROCK, J.—I. Appellants contend that the court erred in overruling the motion for substitution as it was originally presented. The application having been made by the sheriff and by the parties in whose favor the writ of attachment issued, and a bond for costs having been given, it may be this was all that was required under section 2574 of the Code. But this we need not determine, because although the defendants excepted to the rulings, they did not stand thereon, but amended the application by giving bond not only for costs, but for damages, and thereupon the order of substitution was made. Having succeeded in procuring what they desired in the way of substitution, the defendants cannot now complain that terms were imposed upon them not warranted by the statute. A party cannot review an adverse ruling on a demurrer or motion after pleading over, and it seems to us the defendants are in about the same position on this question.

1. PRACTICE:
appeal: waiver
of.

II. The plaintiff contends that the final ruling on the application for substitution was erroneous, because no motion
 2. ———: action
 against sher-
 iff: substitu-
 tion of de-
 fendants. whatever was made until after the defendant Farr had answered. It is argued that under sections 2572, 2573 and 2574 of the Code, construing them together, all applications for substitution must be made before answer. It is true that under the first named section, where a party defendant to an "action upon contract for the recovery of personal property" makes an affidavit before answer that some third party makes a claim to the subject of the action, an order may be made requiring such third person to appear and maintain or relinquish his claim, and if upon notice he fails to appear, the court may declare him barred of all claim in respect to the subject of the action against the defendant therein. Section 2573 makes the provisions of section 2572 applicable to an action against a sheriff for the recovery of personal property taken by him under process. These sections are for the protection of nominal defendants against third persons making claims to the property. But section 2574 seems to be an independent provision. It provides for a joint application by the sheriff and the party in whose favor the process issued, and is not limited as to the time within which it must be made. Indeed there is no reason for such limitation, for if the real party in interest joins in the application, he is bound by whatever steps the nominal defendant has theretofore taken in the action, and by uniting in the application he thereby releases the nominal defendant from any liability to him. In other words, he takes up the defense where the sheriff leaves it, and is not necessarily entitled to delay.

III. We are next to inquire whether the court erred in overruling the petition for the removal of the cause to the
 3. ———: remov-
 al of causes. Circuit Court of the United States. Counsel for the plaintiff does not by his argument question the sufficiency of the bond and affidavit. But it is claimed that the petition for removal is defective because it states that

Bixby v. Blair & Company.

the defendants are all residents of the State of Illinois, and contains no averment that they were such residents at the time of the commencement of the action. The petition is under sub-division 3, of section 639, of the Revised Statutes of the United States, being what is called the "local prejudice" act. The affidavit, in addition to setting forth the prejudice and local influence as required by the statute, stated that the defendants "are and were at the commencement of this suit citizens and residents of the State of Illinois." If this affidavit was proper to be considered in connection with the petition, then there was a showing made that the defendants were citizens of Illinois at the commencement of the action, if such showing was necessary, a point which in our opinion we need not discuss.

In Removal Cases, 100 U. S., 474, it is held that not only the petition for removal, but the whole record, is to be examined; and in *Yulee v. Vose*, 99 U. S., 539 (545), it is said: "The petition and affidavits which accompanied it are to be taken together as a part of the same instrument. They are also to be considered in connection with the other parts of the record to which they belong."

Counsel for appellee concedes that the last cited case might apply if the affidavit had been made of record by a bill of exceptions. We think it is as much a part of the record as the petition, or bond, or any other paper required by law to be filed in the case, and that no bill of exceptions was necessary.

In our opinion the court below should have taken the whole record and showing for a removal into consideration, and ordered the change of forum, especially as the alleged residence of the defendants was in no way controverted. The cause must be affirmed on plaintiff's appeal, and upon defendant's appeal it must be

REVERSED.

McMILLAN v. THE B. & M. R. R. Co.

1. **Evidence:** OBJECTION TO DEPOSITION: PRACTICE. A deposition which has been read without objection upon one trial of an action cannot be objected to on a second trial on the ground of the incompetency of the witness.

Appeal from Monroe District Court.

SATURDAY, JUNE 18.

THIS action was commenced on the fourth day of September, 1872, to recover of the defendant damages for the alleged killing of George W. McMillan, on the 19th day of October, 1870. The cause was tried to a jury at the May term, 1880, of the Monroe District Court. The trial resulted in a verdict and judgment for the defendant. The plaintiff appeals. The material facts are stated in the opinion.

Henry L. Dashiell, for the appellant.

Perry & Townsend, for the appellee.

DAY, J.—The defendant offered in evidence at the trial the deposition, taken upon commission, of James Carpenter, who was the engineer in charge of the defendant's train at the time and place that the accident happened. In this deposition the witness details all the circumstances attending the management of the train at the time the injury was inflicted which resulted in the death of George W. McMillan. When this deposition was offered the plaintiff objected to the admission of it in evidence upon the ground that Carpenter was an interested witness, and disqualified by the provisions of section 3639 of the Code from testifying as to what occurred at the time of the accident. The objection was overruled and the deposition was read in evidence. This ruling of the court constitutes the only ac-

1. **EVIDENCE:**
objection to
deposition;
practice.

Sawyer v. Landers & Son.

tion which is assigned as error. Although the deposition was taken a long time before, and was read in evidence upon a former trial of the case, no objection was made to it until it was proposed to read it on the second trial. The objection came too late, and for that reason cannot be considered. See *Greeedy v. McGee*, 55 Iowa, 759. In the condition of the record it is neither necessary nor proper that we should consider the competency of the testimony of the witness Carpenter.

AFFIRMED.

SAWYER V. LANDERS & SON.

1. **Ad Quod Damnum: RIGHTS OF MORTGAGEE: WHEN NOT MADE A PARTY.** A mortgagee, who is not made a party to proceedings for the condemnation of right of way for a railroad over the mortgaged property, may waive the omission and assert his claim to the award in the hands of the sheriff, and such claim, where it is shown that the property is insufficient to pay the mortgage debt, and that the mortgagor is insolvent, constitutes a lien thereon superior to that of a prior attachment levied by a creditor of the mortgagor.

Appeal from Winneshiek District Court.

SATURDAY, JUNE 18.

THIS is an action in chancery. It is averred in the petition in substance that in 1879 the plaintiff sold to one Johnson, who was made a defendant, certain real estate, and to secure the payment of the purchase money Johnson executed to plaintiff a mortgage thereon, and that the whole amount secured by said mortgage is now due; that in June, 1880, the Waukon and Miss. Railroad Co. located its line of road upon and over said mortgaged premises, and caused a sheriff's jury to be summoned who assessed the damages at \$100, and no appeal was taken therefrom; that said railroad company took possession of the right of way and excavated and

Sawyer v. Landers & Son.

made embankments thereon to the damage of the land in the sum of \$100; that the railroad company paid said sum to the sheriff, and that the defendants, S. W. Landers & Son, were at the time of the condemnation proceedings creditors of Johnson, and that they commenced an action by attachment before a justice of the peace and against Johnson, and said sheriff was garnished as a supposed debtor of Johnson, and that by said proceedings Landers & Son are about to subject the \$100 to the payment of their claim against Johnson; that Johnson is insolvent and said land is insufficient in value to secure plaintiff's claim; that plaintiff has no speedy or adequate remedy at law.

An injunction was prayed restraining further proceedings in said attachment suit, and asking judgment and decree of foreclosure, and that the \$100 be subjected to the satisfaction of the plaintiff's mortgage.

The defendants, Landers & Son, and the justice of the peace, who was made a party defendant, moved to dissolve the injunction. The motion was overruled. Defendants excepted and appeal.

Brown & Wellington, for appellants.

O. J. Clark, for appellee.

ROTHROCK, J.—I. After the motion to dissolve the injunction was overruled, and before the appeal was taken, the plaintiff filed a written dismissal of the action as to the justice of the peace before whom the attachment proceedings were pending, and the proper record entry thereof was made by the clerk of the District Court. We are therefore relieved of the consideration of such questions as were raised in the court below as to the authority of the court to enjoin the said justice from proceeding with the attachment suit which was pending before him.

II. The court below has certified certain questions to us

 Sawyer v. Landers & Son.

which we will proceed to determine. The first question is this: Has the plaintiff under the facts stated in the petition a specific lien on the money alleged to be in the hands of the sheriff, superior to the lien acquired by the defendants, Landers & Son, under the writ of attachment issued by the defendant, J. G. Moss?

1. AD QUOD
damnum;
rights of mort-
gagee: lien.

It will be observed from an examination of the allegations of the petition that the plaintiff was not made a party to the proceedings to condemn the land for the railroad right of way. His mortgage lien therefore was in no way impaired by the *ad quod damnum* proceedings. If he had so elected he might have proceeded with his foreclosure, and the interest of the railroad company in the land would have been junior and inferior to the lien of his mortgage. *Severin v. Cole*, 38 Iowa, 463. But he avers in his petition that the possession of the railroad company, and the excavating and filling thereon, damaged the land to the extent of \$100, the amount awarded by the sheriff's jury. The question is, may he by averring the insolvency of the mortgagor and the insufficiency of the mortgaged premises to satisfy the mortgage, adopt the finding of the sheriff's jury as to the damage to the lands, and waiving his right to have been made a party to the condemnation proceedings, subject the money in the sheriff's hands to the payment of the mortgage? If he may, his lien, although it may not be strictly accurate to designate it as a "specific lien," is paramount to the rights of an attaching creditor of the mortgagor.

As we understand the petition the railroad company has paid in full for the right of way. Indeed, we can hardly suppose a case where a sheriff's jury could apportion the damages between the owner and a person holding a mortgage upon the land. Such an adjustment of the rights of owners and other parties in interest is not within the province of such a tribunal. They estimate the value of the right of way only. Now, it would be grossly inequitable to compel the railroad company to pay twice for the same right, by al-

lowing the owner, or what is the same thing, his creditors, to sieze the money in the hands of the sheriff, and then subject the right of way to the payment of the mortgage. We are clearly of the opinion that in such case the mortgagee may waive the omission to make him a defendant and voluntarily assert his right to the money in the hands of the sheriff. The views here expressed are supported by the case of *Platt v. Bright*, New Jersey Court of Chancery; The Reporter, Vol. 9, 148; and see same case as affirmed by the Court of Errors and Appeals; The Reporter, Vol. 10, p. 177.

III. The next question certified is as follows: "Under the facts stated in the petition, has the plaintiff an adequate remedy at law?"

We think this question must be answered in the negative. The action is for the foreclosure of the mortgage, and for the adjustment and determination of a conflicting claim upon the proceeds of part of the mortgaged property. As between all the parties to the action it clearly appears to us that the questions involved are of equitable cognizance.

IV. The next and last question certified is in substance whether the defendants should be restrained from taking the answer of the sheriff in the attachment proceedings. As we have held that under the allegations of the petition the plaintiff's right to the fund was superior to the right of an attaching creditor, it follows that such creditor should be restrained from taking any action looking to an appropriation of it, in payment of his claim against the mortgagor.

AFFIRMED.

 Dickey v. Brown.

DICKEY ET AL. V. BROWN ET AL.

1. **Usury:** COMMISSIONS TO AGENT. The fact that the agent of a borrower, who is paid a commission in excess of legal interest by the latter for procuring a loan, divides such commission with the agents of the lender will not render the loan usurious.

Appeal from Floyd Circuit Court.

SATURDAY, JUNE 18.

ACTION to foreclose a mortgage. Defense usury. Judgment for the plaintiffs, and defendants appeal.

Ellis & Ellis, for appellants.

Hand & Spriggs, for appellees.

SEEVERS, J.—The mortgage was executed in 1875, to secure four promissory notes for one thousand dollars each, with ten per cent interest from date. The defendant, 1. USURY: commissions to agent. Brown, applied to John Furguson, of Charles City, Iowa, to negotiate for him a loan of four thousand dollars and agreed to pay him for so doing a commission of seven and one-half per cent. Furguson forwarded Brown's proposition to Holland, Furguson & Co., of Rockford, Illinois, who, as agents of the plaintiffs, furnished the money and made the loans. They retained two hundred dollars as their commission, and forwarded thirty-eight hundred dollars to John Furguson, who set aside one hundred dollars for his services, and gave the defendant, Brown, thirty-seven hundred dollars.

The defendants claim at least one of the plaintiffs had knowledge Holland, Dickerson & Co. received the two hundred dollars aforesaid at the time the loan was made, and, therefore, that the plaintiffs through their said agents exacted and received more than ten per cent interest. We are constrained to say this proposition is not well taken.

Paxon v. The Illinois Central R. Co.

John Furguson had the right to do as he pleased with the three hundred dollars Brown agreed to pay him. He could, if he saw proper, divide with Holland, Furguson & Co., and if he could not negotiate the loan otherwise, it possibly was his duty to Brown to do so. John Furguson was the agent of the defendant, Brown, and any contract made between them alone could not have the effect of tainting such contract with usury so far as the plaintiffs are concerned. *Smith v. Wolf*, 55 Iowa, 555.

AFFIRMED.

PAXON ET AL V. THE ILLINOIS CENTRAL R. CO.

56 427
97 451

1. **Railroads:** DISCRIMINATION IN CHARGES: CONSTRUCTION OF STATUTE. No recovery can be had from a railroad company under section 10, of chapter 64, laws of 1874, for discrimination in charges for cars between different shippers of stock, unless it is shown that the shipments were made upon like conditions.

Appeal from Delaware District Court.

SATURDAY, JUNE 18.

THIS action was brought under chapter 68 of the acts of the Fifteenth General Assembly, establishing "reasonable maximum rates and charges for the transportation of freight and passengers on the different railroads of this State." Trial to the court, judgment for the defendant, and the plaintiffs appeal.

C. S. Crosby and Bronson & LeRoy, for appellants.

Griffith & Knight, for appellees.

SEEVERS, J.—The petition states that plaintiffs were engaged in purchasing cattle and hogs at Manchester, Iowa, and that defendant operated a railroad from Sioux City, Iowa, through said Manchester to Chicago, Illinois; that between the eighth day of January and the 21st day of February, 1876, plaintiffs

1. RAILROADS:
discrimina-
tion in charg-
es: construc-
tion of stat-
ute.

Paxon v. The Illinois Central R. Co.

shipped at said Manchester four car loads of hogs, to be carried by defendants to Chicago, Illinois, for which the defendant charged, and the plaintiffs paid, freight at the rate of fifty-six dollars a car, and that between the 10th day of May and the 16th day of September, 1876, the plaintiffs made a like shipment of five car loads of cattle and hogs, for which the defendant charged and the plaintiff paid fifty-six dollars a car freight; "that during all the aforesaid time from January 8, 1876, to September 16, 1876, one William F. Gannon was engaged in the business of buying and shipping cattle and hogs at Manchester, Iowa, and during a portion of that time, to-wit: from January 8th, 1876, to February 21, 1876, he had an arrangement and agreement with the defendant, whereby the defendant agreed to allow said Gannon a rebate or drawback of six dollars per car for all car loads of cattle and hogs shipped by him on said road from said Manchester to Chicago, Illinois, which said rebate or drawback reduced the price of each car load of cattle and hogs so shipped by said Gannon to fifty dollars, being six dollars per car less than the defendant charged the plaintiffs for the same services, and said Gannon shipped several car loads of cattle and hogs under said agreement; that on or about the 20th day of March, 1876, the said defendant made an arrangement and agreement with said W. F. Gannon to allow him a rebate or drawback of sixteen dollars on each and every car load of hogs and cattle shipped by him from said Manchester to Chicago aforesaid, over the said railroad, run and operated by the defendant, which arrangement and agreement was continued from that date to September 16, 1876; that drawbacks or rebatements of sixteen dollars per car were made by said defendant to said Gannon, and that by reason of said drawbacks and rebatements said Gannon during said time was paying the defendant but forty dollars per car for each car load of hogs and cattle so shipped by him, and that he shipped several car loads of hogs and cattle under said agreement during said time

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from Manchester to Chicago; that, by reason of the aforesaid rebates and drawbacks allowed by the defendant to said Gannon, they paid the defendant for four car loads of hogs and cattle shipped as aforesaid over the said road of the defendant from January 8, 1876, to February 21, 1876, the sum of twenty-four dollars, and for five car loads of cattle and hogs so shipped from May 10, 1876, to September 16, 1876, the sum of eighty dollars, making in all, one hundred and four dollars over and above what the defendant charged the said Gannon for the same service during the same time. Wherefore the plaintiffs demand judgment against the defendant for the sum of five hundred and twenty dollars, with interest and costs, and a reasonable sum as attorney's fees, under the provisions of chapter 68, of the laws of the Fifteenth General Assembly of Iowa."

The defendant answered the petition, and denied "each and every allegation therein contained."

No evidence "was introduced in the case, except the parties agreed that the facts were as stated in the plaintiffs' petition, and upon those facts the decision of the court was rendered."

Counsel agree this action was brought under section 10 of the act aforesaid. It provides: "No railroad company shall charge any person, company or corporation for the transportation of any property a greater sum than it shall charge, and collect from any other person, company, or corporation for a like service from the same place, and upon like conditions, and all concessions of rates, drawbacks, and contracts for special rates founded upon the demands of commerce and transportation shall be open to all persons, companies, and corporations alike."

Counsel for the appellee insist that the defendant is not liable under the statute unless it has been established the charges paid by the plaintiffs were "for a like service from the same place and upon like conditions," and as the petition does not allege the shipments made by the plaintiffs and

Gannon were made "upon the like conditions," such fact has not been established.

To this counsel for the appellant replies that "the plain and evident intention of the legislature was to prohibit railroad companies from in any case charging any of its patrons for the carriage of property more than another for the same service." If this be so, the inquiry would seem to be pertinent why did not the General Assembly so say in plain and unmistakable language. This could have been readily done by omitting the words "upon like conditions." Because this was not done "upon like conditions" qualifies what precedes it.

It will be observed counsel ignore or treat as meaningless the phrase "upon like conditions." Upon what principle or rule of construction this is done we are not informed, and we certainly know of none.

Cases, we incline to think, may be supposed, when it would be competent for the carrier under the statute to charge one person more than another for a like service. For instance, suppose the cars loaded by one person were attached to express trains and those of another to ordinary freight trains. But whether this be true is immaterial, because the General Assembly has plainly indicated before the defendant can be made liable, not only must there have been like service but it must have been performed under or upon like conditions. We cannot ignore any part of this statute more than another, nor can we judicially say or know there may not be conditions because of which the defendant could properly charge one person more than another for a like service from the same place.

Counsel for the appellant also insist: "So far as the evidence shows, the services performed by appellee were for a like service from the same place and upon like conditions; there was no evidence to the contrary." There was no evidence tending to show the conditions were alike. It is true there was no evidence to the contrary. But the burden was

The State v. Rice.

on the plaintiff, and the argument above stated is unsound unless we can infer or judicially know there must have been "like conditions" attached to each shipment. This it is clear, in our opinion, we cannot do.

As no right to recover under the statute has been established the judgment of the District Court must be

AFFIRMED.

THE STATE V. RICE.

1. **Criminal Law: PROSTITUTION: WHAT CONSTITUTES.** Whether or not a woman is a prostitute is a question of fact, which does not alone depend on the number of persons with whom she has had illicit intercourse, but in determining which a jury may consider her general conduct and other circumstances tending to show whether or not she so holds herself out to the public.
2. —: **PROSECUTION FOR LIBEL: INSTRUCTION.** In a prosecution for libel in which the defendant is convicted, an erroneous instruction given the jury cannot be held to be without prejudice, although the jury were told that the instructions are advisory merely, and not binding upon them.

Appeal from Butler District Court.

SATURDAY, JUNE 18.

INDICTMENT for a libel. Trial by jury; verdict guilty; judgment, and defendant appeals.

No appearance for appellant.

Smith McPherson, Attorney General, for the State.

SEEVERS, J.—The court instructed the jury as follows: "The indictment charges, as I think, those matters which are libelous as to Lucy Picket. The first, that she aided her daughter, Mrs. Royce, in carrying on the business of a prostitute in the house of Deacon Picket. To justify under the charge the defendant should prove that

1. CRIMINAL
LAW: prosti-
tution: what
constitutes.

56	431
78	494
56	431
106	201
56	431
1130	84

Mary Royce carried on the business of a prostitute in the house in question and was aided by Lucy Picket. It would not be enough to show that Mary Royce in the house in question had illicit commerce with one person, but it should go further and show that she submitted her person to illicit sexual intercourse with various persons; it need not be indiscriminately with all persons, but it should go farther than incontinence with one or two persons, and it should be shown that Lucy Picket knowingly aided in the business of prostitution."

The presumption is there was evidence upon which the foregoing instruction could be properly based. *McMillan v. B., & M. R. R. Co.*, 46 Iowa, 231. The question then is whether a prostitute, or one who carries on the business of such, has been correctly defined in the foregoing instruction. The thought of the instruction seems to be that Mary Royce must have submitted her "person to illicit sexual intercourse with various persons" and that "incontinence with one or two persons would not be sufficient." Now as we understand the jury were told as a matter of law that the acts aforesaid would not be sufficient to constitute Mary Royce a prostitute. It is certainly true, we think, a woman may be a prostitute and carry on the business of such if she so holds herself out to the world. Her house may be so designated by a sign as to make this clearly apparent. She may upon the street or in other public or private places so conduct herself as to make it clear that she is a prostitute, and that such is her occupation. It is not essential, therefore, that Mary Royce should have "submitted her person to illicit sexual intercourse with various persons" and that "incontinence with one or two persons" would not be sufficient to show she was a prostitute.

We think it was for the jury to say whether this would be sufficient, taking into consideration the circumstances and the acts and conduct of Mary Royce at the time and before the sexual intercourse took place.

In other words the accompanying circumstances are im-

The State v. Rice.

portant, and it is not for the court to say the sexual intercourse alone is, or is not, sufficient to establish the woman to be a prostitute.

II. The statute provides: In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libellous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted. Code, § 4099. The constitution also so provides. The statute further provides: "In all indictments and prosecutions for libel the jury, after having received the direction of the court, shall have the right to determine at their discretion the law and the fact. Code, § 4102.

The court in substance instructed or said to the jury the instructions given to them were advisory only, that they were not bound to follow them, and that they had the right to determine both the law and fact.

As no argument has been filed by counsel for appellant we do not desire for the first time to determine the meaning of the foregoing statute to any greater extent than is absolutely required.

The jury may acquit the defendant in any criminal case in direct opposition to the instructions of the court. In so doing they determine both the law and fact. Now it is suggested whether this is not the meaning of the statute aforesaid. But, be this as it may, the court had the right to instruct the jury in this as in any other criminal case, and the conclusive presumption must be indulged that the jury will follow the instructions of the court. Therefore it cannot be said an erroneous instruction is not prejudicial because the jury have the right to determine both the law and fact.

REVERSED.

56	434
107	545
56	434
135	690

GUELICH V. THE NATIONAL STATE BANK OF BURLINGTON.

1. **Principal and Agent:** BANKS AS COLLECTING AGENTS: NEGLIGENCE OF CORRESPONDENTS: Where the holder of a bill of exchange payable at a distant place deposits it with a local bank for collection he thereby assents to the course of business of banks to collect through correspondents, and the correspondent of the local bank to which the bill is forwarded becomes his agent and is responsible to him directly for negligence in failing to present the bill for payment within the proper time.

Appeal from Des Moines District Court.

SATURDAY, JUNE 18.

ACTION to recover the amount of a bill of exchange deposited with defendant for collection by plaintiff's testator, which defendant failed to present for payment to the drawee or to protest for non-payment, whereby the other parties to the paper were discharged. There was a trial to the court without a jury and judgment for plaintiff; defendant appeals. The facts of the case appear in the opinion.

Hall & Huston, for appellant.

P. Henry Smyth & Son, for appellee.

BECK J.—I. The paper in question in this suit was a foreign bill drawn in Munich, Westphalia, upon New York, and was deposited with defendant for collection. In the usual course of business of the bank, it was sent by defendant to its correspondent, the Metropolitan Bank of New York. It may be conceded, in the view we take of the case, that, for the reason the paper was not presented for payment and protested for non-payment by the New York bank within the time required by law, the drawers and indorsers of the bill were discharged. Counsel for defendant insist that for the reason the paper was over due when received by defendant no liability attaches for

1. PRINCIPAL AND AGENT: banks as collecting agents: negligence of correspondent.

failure to protest it for non-payment. They also argue that defendant as a national bank is not liable for the default charged in the petition. These and other questions discussed by counsel we need not consider, as the decision of the case turns upon another point arising upon facts we have just stated.

II. The question which, in our opinion, is decisive of the case, is this: Is defendant liable for the default of its correspondent, the New York bank, in failing to present and protest the bill in due time?

The paper was deposited with defendant for collection; it was payable in New York. The course of business of defendant, and all other banks, is, in such cases, to make collections through correspondents. They do not undertake themselves to collect the bills, but to intrust them to other banks at the place payment is to be made. The holder of the paper, having full notice of the course of business, must be held to assent thereto. He, therefore, authorizes the bank with whom he deals to do the work of collection through another bank.

We will now inquire as to the relations existing between the bank charged with the collection of the paper, and the holder depositing it with the first bank.

The bank receiving the paper becomes an agent of the depositor with authority to employ another bank to collect it. The second bank becomes the sub-agent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection.

The paper remains the property of the customer, and is collected for him; the party employed, with his assent, to make the collection, must therefore be regarded as his agent.

A sub-agent is accountable ordinarily only to his superior agent when employed without the assent or direction of the principal. But if he be employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts. There is, in such a case, a privity between the sub-agent and the principal, who must, there-

Guelich v. The National State Bank of Burlington.

fore, seek a remedy directly against the sub-agent for his negligence or misconduct. Story on Agency, sections 217 and 313. These familiar rules of the law applied to the case, relieve it of all doubt when considered in the light of legal principles.

III. But there is conflict in the adjudged cases upon the question of the direct liability of the bank employed as a sub-agent to the holder of the paper, for negligence or default in its collection. The preponderance of the authorities strongly supports the conclusion we have just reached in this case. The following cases are to this effect: *Dorchester & Milton Bank v. New England Bank*, 1 Cush., 177; *Fabens v. Mercantile Bank*, 23 Pick., 330; *Lawrence v. Stonington Bank*, 6 Conn., 521; *East Haddam Bank v. Scovil*, 12 Conn., 303; *Hyde et al v. Planters' Bank*, 17 La., 560; *Baldwin v. Bank of Louisiana*, 1 La. An., 13; *Aetna Insurance Co. v. Alton City Bank*, 25 Ill., 243; *Stacy v. Dane County Bank*, 12 Wis., 629; *Tiernan v. Commercial Bank*, 7 How. (Miss.), 648; *Agricultural Bank v. Commerce Bank*, 7 Sm. and M., 592; *Bowling v. Arthur*, 34 Miss., 41; *Jackson v. Union Bank*, 6 Har. and J., 146; *Citizens' Bank v. Howell*, 8 Md., 530; *Bank of Washington v. Triplett*, 1 Pet., 25; *Mechanics' Bank v. Earp*, 4 Rawle, 384; *Bellemire v. The U. S. Bank*, 1 Miles, 173; *S. C.*, 4 Wheat., 105; *Daly v. Butchers' & Drovers' Bank*, 56 Mo., 93; *Smedes v. The Bank of Utica*, 20 Johns., 373.

IV. The following cases hold that the bank to whom a bill or note is sent for collection by another bank is not the agent of the owner of the paper: *Allen v. Merchants' Bank*, 22 Wend., 215; *Downs v. Madison Co. Bank*, 6 Hill, 648; *Montgomery Co. Bank v. Albany City Bank*, 3 Seld., 459; *Commercial Bank v. Union Bank*, 1 Kern., 203; *S. C.*, 19 Barb., 391; *Aysault v. Pacific Bank*, 47 N. Y., 570; *Indeg v. Brooklyn City Bank*, 16 Hun, 200; *Reeves v. St. Bank of Ohio*, 8 Ohio St., 465.

V. *Bradstreet v. Everson*, 72 Pa. St., 124; *Lewis &*

Wallace v. Peck & Clark, 10 Ala., 142, and *Pollard v. Rowland*, 2 Blackford, 22, are sometimes quoted as according with the cases last cited. We think they are distinguished from all the conflicting cases above referred to, by the fact that the parties receiving the paper, being collecting agents only, became bound either by express or implied contracts to make the collections themselves. In the other cases there was no such contract shown, but on the contrary it appears that banks in their usual course of business make collections of notes and bills at distant places through their correspondents, with the implied assent of the parties depositing such paper with them. The collecting bank thus becomes the sub-agent of, and is responsible to, the owners of the paper. See Story's Agency, Sect. 217*a* and cases cited.

The decision in *Bank of Washington v. Triplett*, 1 Pet., 25, and *Mechanics' Bank v. Earp*, 4 Rawle, 384, are based upon the ground that the paper in each case was deposited for transmission and not for collection, that is, the receiving bank undertook to transmit the paper to its correspondent and not to collect it. This very element, in our opinion, is in all the cases cited to support our position and in the case before us. Under the usage of banks, paper received for collection at the places other than the town or city where the receiving bank is located is received under the implied contract that it is accepted for transmission to correspondents at the place where it is payable. These cases, we think, are in accord with the other decisions we have cited in support of our views.

Mackersey v. Ramsey, 9 Clark & F., 818, is not in conflict with the doctrine we adopt. In that case the receiving bank expressly undertook to forward the paper and upon its payment to place the amount thereof to the credit of the depositor, and for the performance of its undertaking it was to receive a commission. The paper was collected by its correspondent, who failed soon after, and the bank receiving the paper from its customer never received the funds. Surely under this contract to credit its customers with the amount

Guellich v. The National State Bank of Burlington.

of the paper upon payment, the bank would be bound to give him credit when it was paid to its correspondent and thus became directly liable for the money to the customer.

Allen v. The Merchants' Bank, 22 Wend., 215, which established the doctrine afterwards followed in New York, was announced by a divided court, fourteen senators concurring in the decision and ten, with Chancellor Walworth, dissenting. The case, however, has been uniformly followed in New York.

Hoover, assignee, v. Wise et al., 91 U. S., 308, cited as in conflict with our views, was decided upon these facts: A money demand was first delivered by the owner to a New York collecting agency with instructions to collect the debt. It was forwarded by the agency to lawyers in Nebraska City for collection, who, knowing the insolvency of the debtor, persuaded him to confess judgment upon the claim. The money was collected and forwarded to the agency in New York, but it never reached the hands of the creditor. Proceedings in bankruptcy were instituted within four months after the confession and prosecuted to a decree. The action was brought against the creditor by the assignee in bankruptcy to recover the money collected on the ground that he had knowledge of the insolvency of the debtor when judgment was confessed by him. The court held that the attorneys at Nebraska City were not the agents of the creditor, who, therefore, was not chargeable with notice of the debtor's insolvency through the knowledge they possessed upon that subject. The facts hardly authorize the conclusion that the creditor assented to the employment of a sub-agent in Nebraska City, who should act for him. While it appears that he was informed that it would be sent to an attorney in Nebraska and that the agents received collections to be made by suits in different parts of the country, it is not shown that, under the usual course of business, the New York agents entrusted the management of collections wholly to their correspondents. The business of collecting claims by actions demands professional skill; the

Guelich v. The National State Bank of Burlington.

collection of paper, as is always done by banks, requires its presentation and protest if not paid, and nothing more. The usages of the business of banking would raise an implied assent by the customer of a bank that the paper he deposited should be sent to a correspondent who would become his agent. It does not appear that in the business of collecting claims by suits any such usage exists. It would rather appear that parties employing agents or attorneys to bring suits would look to them alone for the proper prosecution of the action, and not to sub-agents or attorneys of whose skill they know nothing. The distinctions between the facts of that case and the one before us are obvious.

It is proper to remark that the decision was not concurred in by all the justices, three of whom unite in a dissent which presents strong objections to the opinion of the majority. We are clearly of the opinion that this case is distinguishable upon the facts from the case before us, and ought not to be regarded as in conflict with the doctrine we have above recognized.

In many of the cases above cited banks were held not to be liable for the negligence of notaries to whom paper was delivered for protest. Undoubtedly the doctrines which would relieve a bank from liability for the negligence of a notary would protect it when charged with liability for the negligent act of a correspondent.

It may be remarked that while a bank is not responsible for the defaults of proper and competent sub-agents it becomes liable if negligent in selecting incompetent and improper agents to whom it intrusts paper for collection.

We are of the opinion that the District Court erred in rendering a judgment against defendant upon the facts before it.

REVERSED.

KEYSER V. THE K. C., ST. J. & C. B. R. CO.

1. **Railroads:** KILLING OF STOCK; EVIDENCE. Proof that a notice and affidavit of the killing of stock served on a railroad company were similar to others introduced in evidence is insufficient.
2. —: —: —. Evidence and instructions in an action to recover double damages for stock killed on a railroad considered.

Appeal from Pottawattamie Circuit Court.

SATURDAY, JUNE 18.

THIS is an action to recover double the value of a horse, the property of plaintiff, which it is alleged was killed by one of defendant's engines at a place on the road of defendant where it had neglected to fence its track. There was a trial by jury and a verdict and judgment for double the value of the property. Defendant appeals.

Sapp, Lyman & Ament, for appellant.

R. E. Montgomery and *Wm. McLennan*, for appellee.

ROTHROCK, J.—I. It is urged by counsel for the defendant that the proof of service of the notice and affidavit required by Sec. 1289 of the Code was insufficient to authorize a verdict for double damages. The following is all the evidence which was introduced on that point in the case. The plaintiff, while being examined as a witness, testified as follows:

1. RAILROADS:
killing of
stock: evi-
dence.

"I have seen the paper presented to me.

"Ques. You may state what you did with a paper similar to that, if anything? Ans. I read it and gave it to S. F. French, agent of the railroad company at Percival, Fremont county, Iowa.

"Ques. State the time that you read it? Ans. It was on the 14th day of March, 1877. Plaintiff offered in evidence

Keyser v. The K. C., St. J. & C. B. R. Co.

the notice and affidavit identified by the witness. The paper is in these words:

“To the Kansas City, St. Joseph & Council Bluffs Railroad Company:

“You are hereby notified that the locomotive and cars of your railroad, in the latter part of the month of January, A. D. 1877, in Benton township, Fremont county, Iowa, did strike and kill a mare, being my property, of the value of \$150, and that unless you pay me the value of said mare, being \$150, within thirty days from this date, I will claim of you double the value of said mare, as provided by the Statutes of the State of Iowa.

“Percival, Iowa, March 14, 1877.

“CHRISTOPHER KEYSER.”

Sworn to before a justice of the peace.

Objections were made to all of the above evidence as immaterial and incompetent, and the objections were overruled.

Conceding that the service of the notice and affidavit may be shown by the oral evidence of a witness upon the trial, a point which we need not determine, yet we think that the evidence of service of the requisite notice and affidavit was insufficient. In *McNaught v. The C. & N. W. R. R. Co.*, 30 Iowa, 336, it was held that service of a copy of the affidavit was insufficient—that the affidavit itself must be delivered to the agent. Now, whether the witness delivered the original to the agent, or a copy, it is impossible to determine from the evidence. He states that he read to the agent and gave to him a paper similar to that introduced in evidence. They may have been similar papers and the one a copy of the other, but which was the copy it is impossible to determine. As it is stated that the paper introduced in evidence is the notice and affidavit, this may have been the original. Or it may have been that there were two original papers, but this does not appear. The papers may have been similar and yet not in all respects alike, nor the one an exact copy of the other.

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II. The defendant introduced as a witness one Hago, who was the fireman of the engine by which the horse was killed. 2. —: —: In his examination in chief he testified that the horse was standing in a highway crossing when it was struck. On cross-examination he was asked what speed he was running at the time he saw the animal. The question was objected to as not cross-examination and as immaterial. The objection was overruled, and we think properly. It was the plaintiff's right on cross-examination to test the accuracy of the observation of the witness as to the location of the accident by showing the speed which the train was making as affecting his ability to determine the exact location of the animal.

III. The court instructed the jury that "the defendant had no right to fence its track where the same crosses the public highway, but it had a right to fence its track at all other points." It is urged that this instruction is erroneous because the defendant has not the right to fence depot and station grounds. It may be conceded that the instruction as an abstract proposition is not correct, and yet as applicable to the facts of this case it was not prejudicial to the defendant. The plaintiff contends that the animal was struck in a corn-field and the defendant sought to prove that the accident occurred on the crossing of a public highway. It was not claimed that there was any depot or station grounds near where the accident happened.

IV. It is claimed that the verdict is so manifestly against the evidence that it should have been set aside. We have carefully examined the testimony of the witnesses and our conclusion is that the judgment should not be reversed on this ground. There are circumstances testified to by witnesses, such as finding evidences of the accident inside the field, which may have been sufficient to justify the jury in fairly finding as they did, notwithstanding the positive evidence of the engineer and fireman that the horse was standing in, and was struck in, the highway.

Traer Brothers v. Whitman.

We find no error in the ruling of the court except upon the admission of the proof of the service of the affidavit of the loss. If the plaintiff is content he may have judgment for the amount of one half of the judgment below upon paying the costs of this appeal. Otherwise the judgment will be reversed and a new trial ordered. See *Campbell v. C. R. I. & P. R. R. Co.*, 35 Iowa, 334.

REVERSED.

TRAER BROS. V. WHITMAN ET AL.

1. **Judgment: COURT RECORDS: JUDGE'S CALENDAR.** A judge's calendar is not a part of the court records, and an entry therein will not constitute a judgment.
2. ———: **WHAT CONSTITUTES: SIGNING OF RECORDS.** A decree which is signed by the judge in vacation and entered of record by the clerk constitutes a valid judgment, although the record is not signed by the judge.
3. **Judicial Sale: EQUITABLE JURISDICTION: SALE WITHOUT REDEMPTION.** While execution sales under judgments are subject to redemption, a court of chancery may in a proper case order an absolute sale of property without redemption.
4. **Judgment: COLLATERAL ATTACK.** A decree, though erroneous in granting relief not prayed for, cannot be collaterally attacked where the court had jurisdiction.

Appeal from Benton Circuit Court.

SATURDAY, JUNE 18.

ACTION in chancery to restrain defendants from taking and removing a portion of a crop of corn raised upon lands the title of which, plaintiffs allege, they acquired by sale upon execution. The cause was submitted to the Circuit Court upon an agreed statement of facts, and plaintiffs' petition was dismissed; they appeal to this court. The facts of the case appear in the opinion.

56	443
83	474
56	443
94	315
56	443
104	675
56	443
111	506
56	443
142	210

J. C. Traer and W. C. Connell, for appellants.

J. D. Nichols, for appellee.

BECK, J.—I. The plaintiffs allege in the petition that they purchased certain lands upon an execution issued upon a decree in their favor against defendants, which directed the property to be sold without the right of redemption. The decree was entered in an action in chancery brought by plaintiffs, wherein it was charged in the petition that plaintiffs and others had recovered certain judgments against one of the defendants, who had fraudulently conveyed the property to the other defendant to defeat the collection of these judgments. The defendants in that action are defendants in this. It is shown in the petition that plaintiffs have received a sheriff's deed, the sale having been made without redemption in pursuance of the decree; that the land is cultivated by a tenant, and a part of the crop of corn is due from him as rent, and is now ready to be gathered, and that defendants are endeavoring to take and remove the rent corn, which, plaintiffs claim, belongs to them. It is shown that defendants are insolvent. An injunction restraining defendants from taking the corn is prayed for in this petition, and general relief is asked.

The answer among other matters alleges that the action in which the decree was rendered, under which plaintiffs claim to have acquired title to the land, was tried April 5, 1879, when the judge of the court made in his calendar an entry as follows: "Judgment and decree as prayed for in petition and petition of intervention, at defendant's costs. Defendant excepts"; that after the adjournment of the court plaintiffs prepared the decree, inserting therein that the land should be sold without redemption, and presented it to the judge in vacation, who signed it seven days after the adjournment of the court, and that the decree has not been approved by the court. The agreed statement of facts shows that the decree

was in due time, after it was signed by the judge, entered of record. These facts, with others alleged in the answer above set out, which are established by the agreed statement of facts, present the objection raised by defendants to the validity of the decree, the controlling point in the case.

II. Counsel for defendants insists that the entry made by the judge in his calendar is to be regarded as the judgment in the case, and the decree signed by the judge and enrolled by the clerk is void, at least as to the provision authorizing sale without redemption. In the first place the calendar of the judge is not a record of the court. See Code, sections 2747, 196, 197. It is simply for the use of the judge in entering memoranda intended for the guidance of the clerk in entering orders and judgments. Upon its face the entry does not purport to be a judgment; it cannot be so regarded.

The decree, in accord with a practice followed by many of the courts of this State, was signed by the judge; this is often done in vacation. While the decree, after being signed and before it is enrolled, is not regarded as the judgment of the court, it has the effect of a direction to the clerk as to the form and substance of the judgment to be entered by him. In the case before us the clerk was authorized upon filing of the decree to enter it of record, when it became the judgment of the court. The statute authorizes the entry of judgments in vacation when it is not practicable to prepare them during the term. Code, section 177. A judgment is valid though the record thereof be not signed by the judge. *O'Hare v. Leonard*, 19 Iowa, 515; *Childs v. McChesney*, 20 Iowa, 431. This decree, being duly entered in the proper record, must be regarded as the judgment in the case, and if the court possessed jurisdiction to render it, must be regarded as valid, and the execution and sale thereon must be considered as sufficient to pass the title to the land.

III. It is urged that the court had no authority to direct

 Traer Brothers v. Whitman.

the sale of the land without redemption, and that no such relief was claimed in the petition. Sales upon executions issued upon judgments are subject to redemption. But we presume a case may occur wherein the court of chancery would have authority to order an absolute sale. This would be so in case of assent of parties, and may be so under peculiar contracts which could not otherwise be enforced, so that full relief would be granted. We have no doubt that cases may arise wherein absolute sales upon the order of the court of chancery would be authorized by the law. The court below, it will be seen, having jurisdiction of the subject-matter, and of the parties, and having authority to order, in proper cases, absolute sales, did not, in making the order in the case, act without jurisdiction. It may be conceded, for the purpose of this case, that the order is erroneous, but it is not void. It, therefore, cannot be assailed, as is attempted in this case, by a collateral attack.

IV. The objection that plaintiffs' petition does not claim relief by the sale of the property without redemption, if admitted to be well taken, cannot be argued to defeat the judgment in this collateral attack. The court having jurisdiction of the persons of defendants and the subject-matter, may have erred in granting relief not prayed for, but the error in this collateral proceeding is not a ground upon which the decree may be held to be void.

We reach the conclusion that the Circuit Court erred in dismissing plaintiffs' petition. Its judgment, therefore, is reversed, and the cause is remanded for a decree in accord with this opinion.

REVERSED.

HASTINGS & AVOCA R. R. CO. v. MILES ET AL.

1. **Contract: CONDITIONS: SPECIFIC PERFORMANCE.** Evidence considered and held to establish certain conditions upon which an agreement to convey right of way to a railroad company was signed, and that such conditions had not been complied with.

Appeal from Pottawattamie Circuit Court.

SATURDAY, JUNE 18.

ACTION in chancery to enforce the specific performance of a contract to convey the right of way for plaintiff's railroad over certain lands owned by defendant. Upon a trial on the merits, the petition was dismissed. Plaintiff appeals.

Wright & Baldwin, for appellant.

Frank Shinn and Watkins & Williams, for appellee.

BECK, J.—I. The petition alleges that defendant Miles executed a written contract to convey to plaintiff the right of way over certain lands upon the completion of the grading of the railroad; that the road-bed has been graded and defendant refuses to execute a deed conveying the right of way, and has instituted proceedings to assess his damages, resulting from the appropriation of the land for the use of the right of way of plaintiff's railroad. The sheriff, who is conducting the proceedings of *ad quod damnum*, is made a defendant, and the petition prays that defendants be restrained from further prosecuting the proceedings, and defendant Miles be required to specifically perform his contract to convey the right of way.

The defendant Miles admitted that he executed the contract set out in the petition, but alleged that it did not when he signed it contain a description of the land owned by him; that it was never by him delivered, and the possession thereof was fraudulently obtained by plaintiff; that the conditions

upon which it was to be delivered had not been performed; that defendant had withdrawn the contract before it had reached plaintiff's hands on the ground of the non-performance by plaintiff of its terms and conditions, and that of all these things plaintiff had full notice before the contract was received by them.

II. The following points of inquiry, in our opinion, lead to the determination of the case, viz: 1. What were the conditions coupled with the contract, upon which it was executed by defendant? 2. Were these conditions performed? Did defendant withdraw his proposition to become bound by the contract upon the conditions accompanying it, after the non-performance of these conditions: 4. Did plaintiff have notice of defendant's withdrawal of his proposition?

The evidence, we think, shows that defendant executed the contract upon the condition that a subscription should be raised to aid the building of the railroad in the sum of \$1,500, which, with the contract and others of like character, plaintiff should accept as a consideration of the location of the railroad upon a certain line. The plaintiff refused to receive a subscription of \$1,500, and demanded that it should amount to \$2,000. Thereupon defendant declared to the party holding the contract that he would not assent to the plaintiff's proposition, and that he would withdraw his proposition and contract to give the right of way. The preponderance of proof establishes that defendant's contract was executed upon these conditions, which were not complied with.

Plaintiff insists that the contract of defendant was independent of, and had no connection with, the subscription. We think this proposition is not sustained by the proof, and moreover, is unreasonable. It is not denied that the contract was executed as a part of the consideration for the location of the railroad. Now, surely, if the contract and others of the same kind, with a subscription of \$1,500, was not sufficient to induce the plaintiff to locate the road as required,

this contract alone could not be so regarded. If the contract was independent of the subscription, it of course constituted alone a consideration for the location of the road. This leads to an absurd result, and is in conflict with the drift of all the evidence.

III. The refusal of plaintiff to accept the contract and a subscription of \$1,500 constituted a non-performance of the condition upon which defendant signed the contract.

IV. The preponderance of the evidence clearly shows that defendant did proclaim to the parties who had the custody of the contract, that he withdrew his assent to its delivery to plaintiff, and that as it was not accepted under the terms upon which it was executed, he would not regard himself as bound by it.

The preponderance of the evidence satisfactorily shows that the parties who held the contract before it came into the hands of plaintiff, one of whom it is claimed was plaintiff's agent, had notice of defendant's repudiation of his proposition and the contract. That plaintiff had full notice thereof, there can be no doubt. It is clearly shown that plaintiff was informed before the contract came into its hands, that defendant claimed he was not to be bound by it and would refuse to perform it, and plaintiff agreed, at the time the contract was delivered to it, to conduct a suit against defendant to recover upon the contract. This was demanded by other parties who became bound to furnish the subsidy to the railroad company.

We reach the conclusion, which is based upon the evidence, that the conditions upon which plaintiff executed the contract were not performed, and that defendant thereupon withdrew his assent to the delivery of the writing, and proclaimed that he would not be bound thereby. Of all this plaintiff had full notice when the contract came into its hands.

AFFIRMED.

 Wilson v. Crafts.

WILSON V. CRAFTS.

- 1 Tax Deed: EFFECT AS EVIDENCE: NOTICE TO REDEEM.** A tax deed is not conclusive evidence of the giving of notice when the time for redemption from the sale would expire. Following *Reed v. Thompson*, *post*, 455.
- 2. —: VALIDITY OF: EVIDENCE.** Where a notice of the expiration of time for redemption from a tax sale, and a proof of service thereof, are regular on their face and a deed is executed in accordance therewith, any person asserting the invalidity of the deed on the ground that service of the notice was not made as the proof shows, or was not made upon the proper persons, has the burden of overcoming the *prima facie* evidence furnished by the papers.

Appeal from Linn Circuit Court.

SATURDAY, JUNE 18.

ACTION for partition of forty acres of land in Linn county. The plaintiff claims to be the owner of one undivided eighteenth part. The defendant denies that the plaintiff owns any part of the forty acres, and avers that he owns the whole. There was a decree for the defendant. The plaintiff appeals.

Geo. W. Wilson, for appellant.

B. F. Hines, for appellee.

ADAMS, CH. J.—The defendant claims to own the property by virtue of a tax deed, the validity of which is not questioned. But the plaintiff claims to own an undivided eighteenth by virtue of a subsequent tax deed, and this deed appears also to be valid provided the notice of the expiration of the time of redemption required by section 894 of the Code was properly given. The defendant insists that it was not.

Before proceeding to the consideration of the manner in which the notice was given it is proper that we should say that the plaintiff insists that it is immaterial in what manner it was given, or whether any notice at all was given, because the deed is made by

1. TAX DEED:
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evidence: no-
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deem.

 Wilson v. Crafts.

statute conclusive evidence that due notice was given. This court held, however, in *Reed v. Thompson*, decided at the present term, that the deed is not conclusive evidence.

No objection is made to the form of the notice, but it is insisted by the defendant that it was not served upon the right person nor in the right manner. The notice introduced in evidence purports to run "to B. S. Goldman and G. D. Crafts, persons in possession of the following described property," and "to M. Stickell estate, person taxed with the following described property." It was personally served upon Goldman, but upon the others it was served by publication.

The statute provides that the notice must be served upon the person in possession of the land, and upon the person in whose name it is taxed if such person resides in the county where the land is situated. The service may be made upon non-residents of the county by publication.

There is no evidence in this case that Goldman, Crafts or any one else was in possession. There is no evidence that the land was taxed in the name of any person. The defendant claims that the notice so drawn as to describe himself in possession should be regarded as evidence against plaintiff that he, the defendant, was in possession and as the evidence shows that he was not a non-resident of the county and personal service was not made upon him he claims that the service was insufficient, and the deed void. But the fact that the notice was so drawn as to describe the defendant in possession cannot be regarded as evidence that he was in possession. It would indicate that the person who drew the notice so supposed at the time, but we think nothing more.

The notice and proof of service might be sufficient for aught that appears upon their face nor are they impeached by the extrinsic evidence. The affidavit of service required by the statute was made, and this is made by statute to constitute "presumptive evidence of the completed service of notice required." It must then, we think, be presumptive

Brown v. Wyman.

evidence that the persons served were the right persons. Where, then, the notice and proof of service appear upon their face to be regular, and a deed is issued in accordance therewith, any person asserting the invalidity of the deed upon the ground that the service was not made as the proof shows, or that the persons served were not the right persons, has the burden of overcoming the *prima facie* evidence furnished by the papers. As the defendant in the case at bar has failed to overcome such evidence he has not, we think, succeeded in impeaching the plaintiff's tax deed, and the judgment of the court below must be

REVERSED.

BROWN V. WYMAN ET AL.

1. **Mechanic's Lien: IMPROVEMENT UPON LAND: BREAKING PRAIRIE.**

The breaking of prairie is not an improvement upon land such as will entitle the person doing the breaking to a mechanic's lien therefor.

Appeal from Floyd Circuit Court.

SATURDAY, JUNE 18.

ON the 15th day of February, 1876, Amos Pearsall entered into a written contract with Ira Wyman, for the sale to him of one hundred and sixty acres of land, at the price of \$2,080, and the taxes for 1875, the contract providing for payment as follows: \$200, November 1, 1877; \$500, November 1, 1878, 1879 and 1880 respectively, and \$380 November 1, 1881. The contract further provides that if Wyman shall pay the taxes of 1875 before April 1, 1876, and the taxes of succeeding years before they become delinquent, and break one hundred acres on or before July 10, 1876, and construct a dwelling-house worth at least \$200 on or before December 30, 1876, Pearson will execute a warranty deed for the prem-

56	452
86	607
56	452
106	651

Brown v. Wyman.

ises, and Wyman shall execute a mortgage to secure the payments, but if Wyman fails to pay taxes, break and build as agreed, he shall forfeit all rights under the agreement.

Under this contract Wyman entered into possession of the premises. He employed the plaintiff to break thirty-five acres of prairie. The plaintiff also did some hauling for a house removed upon the land by Wyman. Wyman placed a house upon the land not to exceed in value \$150. He never paid anything upon the land, and never obtained a deed therefor. Wyman surrendered the contract, but was allowed to remain in possession during the year 1878, when he surrendered possession of the premises.

On the 5th day of September, 1876, the plaintiff filed a statement for a mechanic's lien upon the land in the sum of \$105 for the breaking, and upon the building and land in the sum of \$9.00, for the hauling. The defendant, Pearsall, paid the sum claimed for hauling. The court decreed that the plaintiff's claim for breaking be declared a first lien upon the house, and a lien upon the real estate subject to the amount due Pearsall from Wyman for the purchase price. The defendant, Amos Pearsall, appeals.

Starr & Harrison, for appellant..

J. S. Root, for appellee.

DAY, J.—The court declared the lien for breaking a first lien upon the building, and a lien upon the land subject to the payment of the purchase-price. The appellant claims that breaking of prairie land is not an improvement on land, within the meaning of section 2130 of the Code, for which a mechanic's lien can be established. Although this question is directly in the case, and, if determined adversely to the right to a lien, decisive of it, yet the appellee has paid no attention to the question in his argument. We regret the necessity of determining a question of first impression, upon a bare presentation of it on

1. MECHANIC'S
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ment upon
land: break-
ing prairie.

Brown v. Wyman.

one side, and without any argument whatever from the other side.

Section 2130 of the Code secures a lien to "every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery or fixtures for, any building, erection or other improvement upon land." Does this provision of the statute give a lien for the mere turning over of the soil with a plow? We feel constrained to hold that it does not. The lien is given for any improvement upon land. Now, whilst breaking and turning over of the soil may constitute an improvement of the land, it cannot in any just sense be denominated an improvement *upon* the land. The breaking of the prairie is necessary to the growth of crops, but not more necessary than the annual plowing which precedes the planting of crops. If a lien should be allowed for the first breaking of the prairie, we are unable to see upon what principle it would be denied for the subsequent plowings, which are indispensable to the proper cultivation of the soil. Fertilizers greatly improve land. It would probably not be claimed that a lien would be acquired for hauling manure upon land. It is not proper for us now to undertake to determine to what classes of improvements section 2130 applies. The only question which is before us is, does it apply to the plowing of the soil? We think that to give it such an application would extend it beyond what was contemplated by the legislature, and beyond what its language, fairly construed, justifies. In allowing the lien, we think the court erred.

REVERSED.

 Reed v. Thompson.

REED V. THOMPSON.

56	455
114	125
56	455
125	533

1. **Tax Deed: EFFECT OF AS EVIDENCE: NOTICE TO REDEEM.** A tax deed is not conclusive evidence that proper notice of the expiration of the time for redemption from the sale was given.

Appeal from Madison District Court.

SATURDAY, JUNE 18.

ACTION in equity to set aside a tax deed and to quiet title to the land. The plaintiff avers that no notice was given of the expiration of the time of redemption. There was a general denial. Decree was rendered for the plaintiff. Defendant appeals.

Ruby & Wilkin, for appellant.

McCaughan & Dabney, for appellee.

ADAMS, CH. J.—The defendant contends in the first place that it does not appear that the plaintiff is in a condition to

1. **TAX DEED:** question his tax title, because he has not shown effect of as evidence: notice to redeem. that he is the holder of the patent title. The case is submitted upon an agreed statement of facts. From this statement it appears that in 1876 one David Stanton held the equitable title to the land and one Francis Davis held the legal title: that Stanton and Davis, while thus holding title, executed each respectively a deed to the plaintiff. In our opinion this is sufficient.

We come, then, to the principal question as to the alleged want of notice of the expiration of the time of redemption.

The tax sale was made January 5, 1874. The notice upon which the defendant relies was given by publication, the first publication being October 12, 1876. The notice and affidavit of publication were filed in the office of the county treas-

Beed v. Thompson.

urer, November 25, 1876. The deed was executed March 3d, 1877. The land was assessed to Francis Davis, who was a non-resident. The notice published purported to be given to Francis Davis. But the statute requires, Code, § 874, that notice shall be given to the person in possession. The plaintiff insists that this was not done. It is agreed that David Stanton, the holder of the equitable title, raised a crop of corn upon the land in 1876 and surrendered possession in the spring of 1877. It is further agreed that upon him no notice of any kind was ever served.

But it is agreed that he saw the published notice, and knew when, according to the notice, the time for redemption would expire. This fact it is claimed by defendant shows that Stanton had the notice required by statute, and that actual service of notice upon him was not necessary to entitle the defendant to a deed.

This position of the defendant, we think, is not well taken. The statute provides what shall constitute notice and proof of service. It provides also that "until ninety days after the service of said notice the right of redemption shall not expire." It is not for us to say that the knowledge of the person in possession may be such as to obviate the necessity of service upon him.

The defendant, however, insists that the deed is conclusive evidence of the service of notice.

Section 897 of the Code provides that the deed shall be conclusive evidence "that the manner in which the listing, assessment, levy, notice and sale were conducted was in all respects as the law directed." The notice spoken of, the defendant claims, is the notice of the expiration of the time of redemption.

But in our opinion the notice spoken of is the notice of sale. It is to be observed that the word *notice* is used in connection with *sale*, and immediately preceding it. The different things necessary to the execution of a tax deed are

Reed v. Thompson.

mentioned consecutively. If they are mentioned in chronological order the *notice* mentioned is the notice of sale.

The defendant insists that the notice is not the notice of sale because the section expressly provides that the deed shall be presumptive evidence of due advertisement or notice of sale, and it would be absurd to provide in the same section that the deed should be conclusive evidence of the same thing. But the statute makes a distinction between the fact of levy, assessment, etc., and the manner thereof. We think it makes a distinction between the fact of notice of sale and manner thereof.

But it is said that the same section provides that the deed shall be conclusive evidence "that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done, except in regard to the points named in this section wherein the deed shall be presumptive evidence only;" that the deed is not made presumptive evidence of the notice of expiration of the time of redemption, and as that is necessary to vest title in the purchaser, the deed must under the provision be regarded as conclusive evidence of it.

This provision is found in subdivision 3 of the section in question, which purports to treat of the prerequisites to be complied with by the *officers* having any part in the transaction relating to or affecting the title conveyed. We think it does not extend farther. The giving of notice of the expiration of the time of redemption is something to be done by the holder of the tax certificate. The statute went very far in making the deed conclusive evidence that the prerequisites to be complied with by the officers had been complied with. Yet the officers were elected for the purpose of doing the things constituting the prerequisites and are wholly disinterested. We cannot think that the statute designed to allow the holder of the tax deed to rely upon it as conclusive evidence of the things to be done by himself.

The effect of the statute requiring notice to be given of the

Reed v. Thompson.

expiration of the time of redemption is to lull property owners into security. If a tax deed is conclusive evidence of notice, where there is no notice, the provision constitutes a most dangerous trap, instead of a protection to property owners.

The deed in question was executed before the expiration of the time of redemption. It is true the three years had expired. But the time of redemption did not expire when the three years did. The statute expressly provides that it shall not expire until ninety days after notice is given. A deed executed before the expiration of the ninety days is just as premature as if executed before the expiration of the three years. We do not say that if it is executed after the three years it would not constitute presumptive evidence that it was executed upon due notice. There is a presumption in favor of the regularity of official acts. But in this case it is agreed that the notice was not given. The presumption then is overcome, and the deed cannot be considered as having any more force than if it had been executed before the three years had expired. It is the right of the plaintiff to have such deed set aside, and although strictly the time of redemption does not appear yet to have expired, yet the plaintiff offers in his petition to pay the amount due as taxes, penalties and costs, and the court found the amount due and decreed that the same be paid, and be a lien upon the premises until paid. We think that the defendant can claim nothing more.

AFFIRMED.

The State v. Gillett.

THE STATE V. GILLETT.

1. **Criminal Law: GREAT BODILY INJURY: DEFINITION OF.** A great bodily injury is an injury to the person of a more grave and serious character than a battery, but what, precisely, constitutes such an injury cannot be stated in an instruction, but is a question for the jury in each case.

56	459
80	590
56	459
128	521
56	459
1139	452

Appeal from the Floyd District Court.

MONDAY, JUNE 20.

THE defendant was indicted for an assault upon one Zeaman Magoon, with intent to inflict a great bodily injury. He was tried and found guilty as charged, and he appeals.

Miller & Oligitt, for the appellant.

Smith McPherson, Attorney General, for the State.

DAY J.—I. The prosecuting witness, Zeaman Magoon, at the time of the injury complained of lived with the defendant, and at the time of the trial was about eight years old. He testified that the defendant whipped him with a crupper to harness, with a buckle on the end of it. He was examined sometime afterward, and injuries, covered with scabs, some of which were suppurating, were found on his back and side. The court gave the jury an instruction as follows: "A great bodily injury is an injury to the person of a more grave and serious character than an ordinary battery, and the indictment charges that defendant intended to inflict such an injury on the boy Magoon. It is not only necessary for the State to prove that the defendant committed an assault, but it must go farther and prove the intent with which he committed it, and that it was to inflict a grave and more serious injury than an ordinary battery or whipping. If the proof should show an assault and battery, but fail to show the ulterior intent charged, the convic-

1. CRIMINAL
LAW: great
bodily in-
jury: defini-
tion of.

The State v. Gillett.

tion could only be for assault and battery." The giving of this instruction is assigned as error. It must be conceded that the instruction does not furnish the jury the means of determining what is the extent of an injury which will constitute a great bodily injury, for the limits of an assault and battery, with which it is compared, and which it is declared to exceed, are not defined. And yet it must be admitted that the instruction defines a great bodily injury as accurately and completely as it is susceptible of definition, as a matter of law. Whether an injury is a great or only a slight bodily injury is essentially a question of fact, and it is difficult to see how any greater aid can be furnished the jury in determining that question than was done by the court in this case.

It is true that a great bodily injury is an injury to the person of a more grave and serious character than an ordinary battery. The objection to the instruction is, not that it states an incorrect proposition, but that the proposition stated is not presented with sufficient completeness. We are unable to perceive how the defendant could, in any way, have been prejudiced by the instruction.

II. The defendant assigns as error the giving of the following instructions: "The intent with which an act is done is an act or emotion of the mind seldom if ever capable of direct and positive proof, but is to be arrived at by such just and reasonable deduction or inferences from the acts and facts proved as the guarded judgment of a candid and cautious man would draw ordinarily therefrom. The law warrants the presumption or inference that a person intends the results or consequences to follow an act which he intentionally commits which ordinarily do follow such acts. If a person makes an assault on another and inflicts on him an injury of a more serious character than an ordinary battery, the presumption is warranted that he intends to inflict a great bodily injury, if there is no evidence tending to show that he intended a less injury. If you find that defendant committed the assault charged, you will determine his intent in so doing

by the surrounding circumstances and all the evidence in the case before you which tends to show the intent."

The instruction contains a correct enunciation of the law, and gives the jury the proper direction.

III. The court instructed the jury as follows: "If the boy Magoon was a member of the defendant's family, and he had taken him to care for and bring up, he would have the right to administer such wholesome and moderate correction as parents usually inflict for the discipline and correctional good of their children, and for such moderate correction or corporal punishment he could not be convicted of any offense, not even of assault or assault and battery. But if the punishment went clearly beyond the degree of moderation and was unreasonably severe and cruel, he would be guilty at least of assault and battery."

The giving of this instruction is assigned as error. It is urged that it assumes the fact of punishment having been inflicted by the defendant. We are of opinion, however, that, taking the entire charge of the court together, the defendant could not have been prejudiced by the last clause of this instruction. The instructions asked and refused, so far as applicable and proper to be given, were sufficiently covered by the charge of the court.

IV. A witness detailing certain admissions of the defendant as to the whipping of Magoon testified as follows: "He said he had whipped him until he dirtied on the floor, and then made him eat it." The last part of this answer is objected to as immaterial. It is evidently, however, a part of the *res gestae*. If any one present at the occurrence had been introduced to testify as to the transaction, it would be competent for him to relate all that transpired at the time of the whipping. On the same grounds the defendant's statement as to all that occurred is competent. We discover no substantial error in the record.

AFFIRMED.

CLARK V. THE TOWN OF EPWORTH.

1. **Municipal Corporations: CONTROL OF STREETS: LIABILITY FOR PERSONAL INJURY.** Section 465 of the Code confers on incorporated towns full control over their streets, and a town cannot escape liability for an injury sustained by reason of the unsafe condition of its streets on the ground that they were put in such condition by the supervisor of the road district.

Appeal from Dubuque Circuit Court.

MONDAY, JUNE 20.

THE plaintiff filed a petition in substance alleging that the defendant is a municipal corporation organized and existing under the general laws of the State, and it is its duty to keep the streets in said incorporated town in good order and repair; that within said town there is a street called and known as Main street, which is a public highway for the passage of all persons on foot and with teams; that with the knowledge, approval and consent of the defendant a deep and dangerous ditch had been dug across Main street, just where said street crosses Center street, within the incorporated limits of said town, which was on the 22d day of June, 1880, and during the night of said day negligently left uncovered, without any proper protection, and without any light or signal to indicate danger; that on the night of the 22d of June, 1880, the plaintiff with his wife and minor son were lawfully passing along said street within the corporate limits of said town, in a wagon drawn by horses, and while on said Main street plaintiff, wholly unaware of danger, and without any fault or negligence on his part, drove into said ditch, by reason of which plaintiff's wagon was overturned, and he, and his wife and his son, were greatly injured, to the damage of plaintiff in the sum of one thousand dollars. The defendant demurred to this petition on the following grounds: "The petition does not show that the defendant had control of its streets at the

56	462
106	45
106	469
106	473

56	462
119	624

Clark v. The Town of Epworth.

time of the accident, or that the injury complained of was caused or occasioned by any act done by the defendant."

This demurrer was overruled. Afterward, by consent of parties the ruling on the demurrer was set aside, and plaintiff amended his petition as follows: "That with the knowledge, consent and approval of said defendant town and its officers, the highway supervisor of the township in which defendant town is situated dug a deep and dangerous ditch across said Main street just west of where said street crosses Center street, and within the incorporated limits of said defendant town, and that, although said defendant town and its officers well knew the same to be in said street, they negligently suffered the same to remain open and uncovered, and in a dangerous condition on the night of the 22d day of June, 1880, and by reason of which plaintiff, while passing along said street on said night, and without any fault or negligence on his part, sustained the injuries complained of."

The parties agreed that the demurrer already filed should apply to the petition as amended. Thereupon the court sustained the demurrer. The plaintiff refused to further amend, and judgment was rendered against him for costs. The plaintiff appeals.

Utt Brothers, for appellant.

McCeney & C'Donnell, for appellee.

DAY J.—It is conceded that the question sought to be raised by the demurrer, and the only one which either party desires to have determined is: "Can an incorporated town, organized under the general incorporation act, be held liable to a citizen for an injury sustained by him while passing along a public highway in said town, which was occasioned by an excavation made in such highway by the supervisor of the highway district in which said town is located, while such supervisor was engaged in repairing the highway?"

1. MUNICIPAL corporations: control over streets: liability for personal injury.

Clark v. The Town of Epworth.

It is claimed by the appellee that road districts include incorporated towns; that road supervisors are voted for by the inhabitants of such towns; that road taxes are levied upon the property included in such towns and paid over to the road supervisor, whose duty it is to expend the tax upon the highways in his district, including streets in an incorporated town, and, as a consequence, it is insisted that for any defect in the street occasioned by the road supervisor, while engaged in repairing the street, the incorporated town cannot be held responsible.

Section 969 of the Code provides that the township trustees shall divide their respective townships into such number of highway districts as they may deem necessary for the public good. This provision is broad enough to confer upon the township trustees unrestricted control over the establishment of highway districts in their townships; yet in *Marks v. The County of Woodbury*, 47 Iowa, 452, it was held that the power of township trustees to divide their townships into road districts extends only to so much of the township as is not embraced in a city. The decision was based upon Sec. 527 of the Code, which provides that the city council shall have the care and control of all public highways and streets within the city, and shall cause them to be kept in repair. It was held that this necessarily excludes the care and control of any other officers. Chap. 10, Tit. 4 of the Code, confers certain general powers upon both cities and incorporated towns. Among these powers, Sec. 465 provides: "They shall have power to provide for the grading and repairs of any street, avenue, or alley, and the construction of sewers, and shall defray the expenses of the same out of the general funds of such city or town." Sec. 5, Chap. 51, Laws of 1874, repeals so much of this section as requires the expense of the grading of alleys to be paid out of the general funds. See Miller's Code, page 135.

Sec. 465 of the Code confers upon an incorporated town power to provide for the grading and repairs of any street.

Ward v. Wolf

Power to thus grade and repair must of necessity be accompanied with *control* over the streets, for without such control the power could not be exercised. Power to grade and repair would be futile, if a grade made by the town authorities one week could be destroyed by the road supervisor, in the discretionary discharge of his duties, the next week. The same reasoning which, under Sec. 527 of the Code, inhibits the township trustees from including a city in a road district, inhibits them, under Sec. 465, from including an incorporated town in such road district. The inconvenience and conflicts which would arise from allowing two independent bodies to assume charge of the grading and repairing of streets in a town, are so apparent that they need not be mentioned. In our opinion, Section 465 of the Code confers upon the defendant control of its streets, and it cannot escape liability upon the ground that its streets were put in an unsafe condition by the road supervisor.

REVERSED.

WARD V. WOLF ET AL.

1. **Will: PERSONALTY: WIDOW'S SHARE.** The widow's share of her husband's property provided for in section 2452 of the Code includes both personal and real property, and a husband cannot by a will, made either before or after marriage, deprive his widow of her share in his personal estate. *SEEVERS and DAY, JJ., dissenting.*

56	465
87	194
56	465
105	622

Appeal from Van Buren Circuit Court.

MONDAY, JUNE 20.

THIS is a proceeding for the probate of a will. The widow, the plaintiff, objected to the will on the ground that it was executed before her marriage with the testator, and the disposition of all his property made therein, if sustained, will defeat her rights secured by the law. The Circuit Court

Ward v. Wolf.

decided that the will does not affect the right of the widow to her share of the personal and real property, and that the property remaining after her share is set apart will be disposed of as provided in the will. Certain heirs and legatees under the will, the defendants herein, appeal.

Work & Brown, for appellants.

Lea & Wherry, for appellee.

BECK, J.—I. The case presents for determination this question: Is the right of a widow to the share of the personal property and real estate of her deceased husband prescribed by statute defeated by a will of her husband executed before her marriage with him?

1. WILL: personal property and real estate of her deceased husband prescribed by statute defeated by a will of her husband executed before her marriage with him?

In our opinion certain provisions of the Code afford a solution of the question. It becomes, therefore, unimportant to consider the decisions of the courts touching the effect of the marriage of a testator upon a will before executed. They are understood to be conflicting.

Code, section 2452, is in the following language: "The widow's share cannot be affected by any will of her husband, unless she consents thereto within six months after notice to her of the provisions of the will by the other parties interested in the estate, which consent shall be entered on the proper records of the Circuit Court."

It cannot be doubted that the subject of this provision is the share of the widow in the estate of her deceased husband. And it is equally plain that the will contemplated by the provision is "any will" made before or after marriage of the husband. The provision is not restricted to wills made after marriage. The object of the statute is to deprive the husband of the power to dispose of his property in such a manner as to prevent his widow recovering the share allotted to her by the statute. If the law will not enforce a will made after marriage with the express purpose of defeating the right of the widow, why should it enforce an ante-nuptial will when

no such purpose can be inferred, for the reason that the marriage relations did not exist when it was executed?

II. We will now inquire what is included within the subject of the provision expressed by the words "widow's share." The word "share" is used in the context to describe the portion of the estate of a decedent which the law assigns to the widow. It is called the "distributive share." §§ 2437, 2441. This term, it will be discovered, is applied both to the widow's portion of the personal property and to her interest in the real estate. In section 2437 it is applied to personalty, and in 2441 to real estate. It follows that section 2452 prohibits a disposition by will of either personal or real property which operates to deprive the widow of her share therein.

The decision of this court in *The Estate of Davis*, 36 Iowa, 24, was under a statute differing from the provision of the Code above considered, and is not, therefore, applicable to the case before us. We held, in that case, that a statute declaring the widow's dower cannot be affected by a will did not control the disposition of personal property, for the reason that the term *dower* cannot be applied to personal property. In the statute now in force the term "distributive share" is used instead of dower, and, as we have seen, it is applicable to both personal and real property.

Smith v. Zuckmeyer, 53 Iowa, 14, and *Linton v. Crosby*, 54 Iowa, 478, involved real property only, and the questions considered in each case relate to the interest of the husband and wife in the lands of his or her spouse. Such an interest, it is held in both cases, is designated in the statute by the term *distributive share*. The cases do not determine whether the interest in personal property is included in the term *distributive share*, and is or is not subject to disposition by will. They have no bearing on the question in this case which involves the right of the wife to the personal property of her deceased husband.

III. No question is raised in this case involving the cor-

Ward v. Wolf.

rectness of the decision of the court below holding the will to be valid as to all property not included in the widow's share. This question we have not considered, and do not decide. The decision of the Circuit Court is

AFFIRMED.

SEEVERS, J., *dissenting*.—The statute provides: "The personal property of the deceased not necessary for the payment of debts, nor otherwise disposed of as hereinbefore provided, shall be distributed to the same persons and in the same proportions as though it were real estate." Rev., § 2422; Code, § 2436.

It is important to ascertain what personal property has been "otherwise disposed of as before provided" in the statute. The provision is that "any person of full age and sound mind may dispose by will of all his property except what is sufficient to pay his debts, or what is allowed as a homestead, or otherwise given by law as privileged property, to his wife and family." Rev., § 2309; Code, § 2322.

The personal property that is "privileged" is that contemplated in Rev., §§ 2361, 2370 and 2403; Code, §§ 2371, 2375 and 2419. This was ruled *In the Matter of the Estate of Jacob Davis*, 36 Iowa, 24. This case was decided under the Revision, but there is no substantial difference between it and the Code, as will appear upon a comparison of the sections above referred to. "If the intestate leaves no issue, the one-half of his estate shall go to his wife." Rev., § 2495; Code, § 2455. This includes both real and personal property, but does not apply or control the rights of any one if there is a will whereby all the property of the deceased has been devised to other persons than the widow. In such case she can only take one-third of the real estate. *Linton v. Crosby*, 54 Iowa, 478. There was no controversy in the case cited in relation to personal property, but the case clearly holds that the meaning of the words "distributive share" as

used in the statute in defining the rights of the widow in the absence of a will, does not include more than one-third of the real estate, or what at common law was recognized as her dower, as modified by statute, in so far as the same is thereby made a fee simple estate. This definition or construction of the same "distributive share" should be held applicable to personalty, and as the widow has no dower right therein, the husband can dispose of the whole by will. It follows, I think, when the Code, § 2452, declares the widow's share cannot be affected by a will, it means the share above mentioned, that is, one-third of the real estate, and this is not enlarged by section 2436, or any other section of the Code.

Section 2437 of the Code applies without doubt to personal property, but it cannot affect the question under consideration, because when there is no will the widow is clearly entitled to a share of the personalty, and section 2441 evidently, I think, refers to real estate only.

The mistake in the foregoing opinion, it seems to me, is the conclusion that the rights of the widow were enlarged by the Code. The primary object in substituting "distributive share" was to get rid of the word "dower." As applied to the case in hand, such was the only object in making the change. This, I think, is apparent from the report of the Code commissioners. The judgment of the Circuit Court should be reversed.

Justice DAY unites with this dissent.

VAN ORSDOL V. THE B., C. R. & N. R. Co.

56 470
86 354
56 470
129 477
56 470
133 646

1. **Railroad: NEGLIGENT CONSTRUCTION: EVIDENCE.** In an action to recover damages sustained by reason of the negligent construction of a railroad over the plaintiff's farm, the fact that the road is built as railroads usually are in such locations is no defense.
2. —: —: **DAMAGES.** Where it is practicable in the building of a railroad to construct a culvert which will allow the passage of the water of a stream in its natural channel, it is negligence not to do so, and a land-owner injured by such failure may recover damages.
3. —: —: —. A right of action to recover for permanent injuries to land resulting from the negligent construction of a railroad thereon accrues at the time the first injury is sustained, and not necessarily from the date of the construction of the road.

Appeal from Buchanan Circuit Court.

MONDAY, JUNE 20.

ACTION to recover damages sustained by plaintiff by reason of a stream of water being diverted in the construction of defendant's railroad, whereby sand and earth were washed upon and deposited on plaintiff's land. Judgment upon a verdict was rendered for plaintiff; defendant appeals.

J. & S. K. Tracy and *D. W. Bruckart*, for appellant.

Hasner & Van Orsdol, for appellee.

BECK, J.—I. The petition alleges that the defendant's railroad is located upon plaintiff's farm, and crosses two sloughs thereon, the water of which in the natural state was clear and pure, and ran over a grassy bottom; that in the construction of the railroad one of the sloughs was dammed, and the water thereof diverted from its natural course, and conducted for a long distance through loose sand and dirt into the other slough, over which a culvert was constructed;

Van Orsdol v. The B., C. R. & N. R. Co.

that the water flowing through the loose sand and dirt from the first named slough bore a large quantity thereof, which was deposited upon plaintiff's land; that by reason of "the faulty construction" of the railroad, which has not been changed, plaintiff has sustained damages, and that the injury from the deposits made upon his land is permanent, and commenced in July, 1876.

The defendant in its answer alleges that the railroad was constructed in 1873, and that the defendant became the owner thereof in 1876, and denies any negligence or unskillfulness in the construction of the road. It is averred that if any cause of action ever existed, it accrued more than five years before the suit was commenced, and is, therefore, barred by the statute of limitations.

II. The plaintiff testified that his farm "without the railroad constructed so as to dam up the slough" would be worth twenty-five dollars per acre. He was then asked the present value of the farm with the railroad constructed as it is, without a culvert over the slough. Objections to this question were overruled, and plaintiff answered that it is worth twenty-one dollars per acre. The admission of this evidence is the ground of the first objection to the judgment urged by defendant's counsel. It is insisted that the evidence should have been limited to the value of the land immediately before and after the road was built in order to show plaintiff's damages. But the injury was not sustained upon the completion of the road, and did not occur till the expiration of three years after. The evidence could not have been directed to the time immediately before and after the building of the road, for no injury had then occurred.

III. It is further insisted that the claim of plaintiff is based upon the injury to the use of the land, and not to the land itself. We do not so understand the pleadings. The injury complained of is alleged to be a permanent injury to plaintiff's farm.

IV. The defendant offered to prove by an engineer that

 Van Orsdol v. The B., C. R. & N. R. Co.

the railroad is built as railroads are usually constructed in such locations. The evidence was rejected. The issue raised by the pleadings involves the question of negligence in the construction of the road in crossing the slough without a culvert. The custom or practice of building railroads cannot be the ground of defeating recovery for negligence. If it were so, the rights of land-owners would depend upon the "usual manner" of building railroads. But his rights are absolute, and not dependent upon the will or acts of railroad companies. A stream of water cannot be diverted from its natural channel to his injury. *Stodghill v. C., B. & Q. R. Co.*, 43 Iowa, 26. A railroad company cannot defeat an action for damages based upon such a diversion of a water-course, on the ground that its road is constructed in the usual manner.

V. Certain instructions are objected to in the third point of counsel's argument, on the ground that plaintiff does not claim to recover for the negligent construction of the road. We understand the pleadings to raise the issue of negligence. The record fails to establish the fact upon which counsel's objection is based.

VI. An instruction is to the effect that if it was practicable for defendant to construct a culvert, or other means for the passage of the water of the slough, and the omission so to do caused injury to plaintiff, he is entitled to recover. Counsel for defendant insist that it may have been practicable to build the culvert, and yet there was no negligence in failing to do so. We think differently. The law secures to plaintiff the right of an unobstructed passage of the streams of water running through his land in their natural channels. If, in the construction of the road, a stream is diverted to his injury, he may recover. *Stodghill v. C., B. & Q. R. Co.*, *supra*. If the instruction is erroneous, it is too favorable to the railroad company, which cannot, therefore, complain.

VI. The injury to plaintiff's land complained of in the

Wing v. Glick.

petition and shown by the evidence was permanent. Defendant insists that it occurred when the road was built, in 1873, and that the action is, therefore, barred by the statute of limitations. But the petition alleges that the first injury sustained by plaintiff was in 1876, and the jury by a special verdict so found. The statute of limitations began to run from that date. *Powers v. The City of Council Bluffs*, 45 Iowa, 652. This action was commenced in 1879; it is, therefore, not barred by the statute.

We have considered all questions discussed by defendant's counsel, and discover no error in the record. The judgment is

AFFIRMED.

WING V. GLICK ET AL.

1. **Contract:** MADE BY OFFICER OF CORPORATION: PERSONAL LIABILITY ON. A contract containing the words "we promise to pay," and signed by two persons describing themselves respectively as "president school board" and "secretary school board," but which contained no reference to any school district, was held to be the personal obligation of the signers, who could not show by parol evidence that such was not in fact the intention.

56	478
82	294
56	478
85	641
56	473
90	732
56	473
100	722

Appeal from Jones District Court.

MONDAY, JUNE 20.

THIS action was brought to recover of the defendants, W. H. Glick and I. B. Southwick, as makers of a contract which is in these words:

"STATE OF IOWA, COUNTY OF JONES, }
TOWNSHIP OF HALE. }

"*Mr. S. J. Wing, 132 South Clarke St., Chicago, Ill.*

"DEAR SIR: Please deliver to W. H. Glick at his residence nine sets of national business and primary charts at \$36.00

Wing v. Glick.

per set, \$324.00, and we agree to pay for said goods on the first day of March, 1879, with interest at six per cent after due.

"I. B. SOUTHWICK,
Sec'y School Board.

W. H. GLICK,
Pres. School Board."

The defendants for answer do not deny the execution of the contract, but they say that the same was not executed as their contract, but the contract of the District Township of Hale.

There was a trial by jury and a verdict and judgment were rendered for the defendants. The plaintiff appeals.

W. I. Chamberlin and Herrick & Doxsee, for appellant.

J. W. Jamison, for appellees.

ADAMS, CH. J.—The defendants were allowed to show by parol evidence that the contract was executed as the contract of the District Township of Hale. The plaintiff insists that the court erred in allowing such evidence, because the effect was to add to the terms, and change the effect of, a written instrument.

It will be observed that the District Township of Hale is not mentioned in the contract, nor are any words, letters or abbreviations used with the design of indicating such district township. Most clearly such district township cannot be said to be a party to the contract so far as its terms are concerned. It follows that unless the contract can be held to be the contract of the defendants it is the contract of no one. But we are not allowed to so construe a contract as to deprive it of all force if it is susceptible of any other reasonable construction.

If the defendants had not appended to their signatures a description of themselves it would have been abundantly evident that they intended to assume a personal obligation. The language of this contract is "we agree to pay," etc. But the description alone will not enable them to evade the obliga-

tion. It is well settled that where a person in executing a contract describes himself as agent without disclosing his principal the contract becomes the personal obligation of the maker and no one else. *Kenyon v. Williams*, 19 Ind., 44. The case before us is not essentially different. The defendants describe themselves as officers, but the contract neither shows nor indicates the corporation of which they are officers. Some authorities have gone so far as to hold that the officer incurs a personal obligation, even where in the description of himself he fully sets out the corporation of which he is an officer. In *Honeskill Mut. Fire Ins. Co. v. Newhall*, 1 Allen, 130, the note upon which the action was brought was signed, "Cheever Newhall, President of the Dorchester Avenue R. R. Co." As the note contained no words in the body thereof purporting to bind the Dorchester Avenue R. R. Co., it was held to be the personal obligation of the maker. The same rule was held in *Fiske v. Eldridge*, 12 Gray, 476, where the note was signed "John S. Eldridge, Trustee of Sullivan R. R.;" and in *Sturdivant v. Hall*, 59 Me., 172, where the maker described himself as "Treasurer of St. Paul Parish;" and in *Barker v. Mechanics' Fire Ins. Co.*, 3 Wend., 94, where the maker described himself as "President of the Mechanic's Fire Ins. Co.;" and in *Powers v. Briggs*, 79 Ill., 493, where the makers described themselves as "trustees of" a specified church; and *Moss v. Livingston*, 4 Comst., 208, where an acceptor described himself as "President of Rosendale Manufacturing Company." See also *Hayes v. Crutcher*, 54 Ind., 260, and *Gregory v. Ligh*, 33 Texas, 813.

The defendants rely upon *Lacy v. Dubuque Lumber Company*, 43 Iowa, 510. Whether that case can be reconciled with the cases above cited we need not determine. Conceding that it holds a very different rule it is not authority for the defendants. The note in that case, it was held, appeared *upon its face* to be the obligation of the defendant corporation, at least with an explanation of abbreviations used.

 Perkins v. Directors Ind. School District of West Des Moines.

In our opinion the defendants in the case at bar in executing the contract assumed a personal obligation, and it was not proper, we think, to allow them to show by parol that such was not in fact the understanding.

REVERSED.

56	476
78	552
56	476
97	536
100	321
56	476
111	25
56	476
124	367
56	476
129	444
129	445
129	540

PERKINS V. THE BOARD OF DIRECTORS OF THE INDEPENDENT
SCHOOL DISTRICT OF WEST DES MOINES.

1. **Schools: POWERS OF DIRECTORS: MANDAMUS.** The courts may by *mandamus* compel the reinstatement in the public schools of a pupil excluded under a rule of the board of directors, which is void for want of power in the board to adopt it. In any case wherein the jurisdiction and powers of directors or school officers are brought in question a party is not confined to his remedy by appeal to the county superintendent, but may maintain an original action in the courts. ROTHROCK and SEEVERS, JJ., *dissenting*.
2. —: —: **SUSPENSION OF PUPIL.** A board of directors has no power to adopt a rule which will deprive a child of school privileges except as a punishment for breach of discipline or an offense against good morals.

Appeal from Polk Circuit Court.

MONDAY, JUNE 20.

MANDAMUS to compel defendants to admit plaintiff into the public school of their district. A demurrer to plaintiff's petition was sustained and judgment rendered for defendants; plaintiff appeals.

Barcroft & McCaughan, for appellant.

Brown & Dudley, for appellees.

BECK, J.—The petition alleges that plaintiff is a minor of the age of twelve years, and resides within the bounds of the school district of which defendants are directors; that under the law he has a right to attend defendants' school, and did so

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attend until the superintendent, in obedience to an order of defendants, refused him admittance thereto, and that he is a person of good moral character and has not been guilty of gross immorality nor of the persistent violation of any rule of the school. The petition shows that plaintiff was expelled from the school upon the following grounds:

“That on or about the 20th day of September, 1880, while he in company with other pupils of said school was engaged in playing ball, at a proper time, in the neighborhood of said school house, he unintentionally and by accident batted a ball through one of the windows of the school house, breaking a glass of the value of about three dollars.

“That the defendants had made a rule as follows: ‘Scholars who shall be guilty of defacing or injuring any school property shall be required to pay for all damages. Notice of such damage shall be sent to the parents or guardians of the pupil, and in default of payment the case shall be reported to the president of the board who may proceed with it according to law. Scholars thus reported to the president shall not afterward be allowed to attend until payment of damages shall have been made or the case otherwise adjusted.’

“That in pursuance of such rule, payment of said damages was demanded and notice thereof sent to plaintiff’s parents, but plaintiff says that he is a child, without means, and unable to earn means to pay such damage, and as a minor is not legally bound to pay the same.

“That his parents refused to pay for said glass, and that for such non-payment, and for no other cause, or excuse, or pretense of cause, the said Parish [the superintendant of the school] refused, and refuses, him admittance to said school, and the defendants ratified his refusal and have directed him, as aforesaid, not to admit plaintiff into said school until the payment of such damage.”

The plaintiff alleges that defendants have no authority to enforce the rules under which he was excluded from the

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school, and that the action of the defendants in expelling him is unjust and oppressive and in violation of his rights.

To the petition defendants demurred on the ground: 1st, that the court has no jurisdiction of the cause of action set out in the petition, the law creating a special tribunal to which plaintiff should appeal from the action of the board of directors; 2nd, the facts stated in the petition do not show the rule, under which plaintiff was expelled from the school, to be unreasonable or unlawful and in excess of the authority of the defendants in the government of the school.

I. We shall first inquire whether the Circuit Court has jurisdiction of this action. The statute provides that any person aggrieved by any order or decision of the directors of a school district may appeal to the county superintendent and from him an appeal may be prosecuted to the superintendent of public instruction. Code, sections 1829, 1835.

We need not inquire to what class of cases, wherein the directors may make decisions and orders, appeals to the county superintendent are limited. That they are limited is very plain. It cannot be held that decisions and orders refusing the allowance and payment of claims against the district, or construing contracts, or affecting the possession of or right to property, when the interest of a citizen is affected thereby, may not be questioned except upon appeal. That many such decisions and orders cannot be reviewed under the statutes quoted upon appeal must be conceded. It is not necessary to inquire just what class may be appealed to the county superintendent and in what cases original actions may be prosecuted in the courts.

It is very plain that in one class of cases appeals are not the exclusive remedy for reviewing or assailing the decision and orders of the school directors. This class includes all cases wherein the jurisdiction and power of the directors are brought in question and wherein questions arise involving

the construction of statutes conferring power upon school officers. The courts of the State are arbiters of all questions involving the construction of the statutes conferring authority upon officers and jurisdiction upon special tribunals. It was certainly never the intention of the legislature to confer upon school boards, superintendents of schools, or other officers discharging *quasi* judicial functions, exclusive authority to decide questions pertaining to their jurisdiction and the extent of their power. All such questions may be determined by the courts of the State. Hence, when the rights of a citizen are involved in the exercise of authority by a school officer, the courts may determine whether such authority was lawfully exercised.

The courts by *mandamus* may compel the directors of a school to admit a pupil who has been unlawfully excluded. See *Clark v. The Board of Directors*, 24 Iowa, 266; *Smith v. Independent School District*, 40 Iowa, 518; *Dove v. Same*, 41 Iowa, 689.

III. We are next to inquire whether defendants, as school directors, had authority to promulgate and enforce the rule 2. —; —; under which plaintiff was excluded from the suspension of pupil. school.

It will be observed that plaintiff was guilty of no breach of discipline or of any offense against good order.

By an accident and without any evil purpose he broke a window-glass. The rule requires him to pay the damage done and in default thereof authorizes the directors to exclude him from the school. We may admit that he ought to pay the damages and is liable therefor. But we think his omission to perform this duty cannot be punished by expulsion from the school. The State does not deprive its citizens of their property or their liberty, or of any rights, except as a punishment for a crime. It would be very harsh and obviously unjust to deprive a child of education for the reason that through accident and without intention of wrong he dea-

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troyed property of the school district. Doubtless a child may be expelled from school as a punishment for breach of discipline or for offenses against good morals, but not for innocent acts.

In this case the plaintiff was expelled not because he broke the glass, but because he did not pay the damage sustained by the breaking. His default in this respect was no breach of good order or good morals. The rule requiring him to make payment is not intended to secure good order but to enforce an obligation to pay a sum of money.

We are clearly of the opinion that the directors have no authority to promulgate or enforce such a rule.

We conclude that the court erred in sustaining the demurrer to the petition.

REVERSED.

ROTHROCK J., *dissenting*.—The Code, Sec. 1829, provides as follows: "Any person aggrieved by any decision of or order of the district board of directors, in matter of law or fact, may within thirty days after the rendition of such decision or the making of such order appeal therefrom to the county superintendent." By Sec. 3376 it is provided "that an order of *mandamus* shall not be issued in any cause where there is a plain, speedy and adequate remedy in the ordinary course of the law" * * * *. Now if the plaintiff in this case had the right to appeal from the order of the directors prohibiting him from attending the school, and if an appeal was an adequate remedy, the proceedings by *mandamus* cannot rightfully be maintained.

The board of directors had power to make rules and regulations for the government of the schools. Code, § 1726. The directors are required to aid the teachers in establishing and enforcing rules for the government of the schools (Code, § 1734); and they may dismiss or suspend any pupils from the school for gross immorality, or for persistent violation of the regulations or rules of the school. § 1735. The rule or

regulation under which the plaintiff was suspended may have been wrongful, and one which the directors ought not to have made, and it may be that it should not have been enforced against plaintiff. But these questions could have been fully and fairly tested in the ordinary course of the law by an appeal to the county superintendent. It is no answer to this position to say that the remedy by appeal provided by law is inadequate, because the decision of the county superintendent or the state superintendent, if appeal be taken to him, cannot be enforced. The presumption is that if upon appeal the order should be reversed, the directors will obey the decision of the appellate tribunal. Upon their refusal to do so it will be time enough to resort to the courts for the writ of *mandamus*. As is said in *Ind. Dist. of Lowell v. Ind. Dist. of Duser*, 45 Iowa, 394, "while his action (the county superintendent's) would not be in the nature of a judgment upon which process for the collection of the amount awarded to the party recovering could issue, it would be a decision binding upon the parties." In *Marshall v. Sloan*, 35 Iowa, 445, it was squarely held that a party aggrieved by the action of a board of school directors, having an adequate remedy by appeal to the county superintendent, and from him to the state superintendent, is not entitled to a writ of *mandamus*. And in *Kirkpatrick v. Ind. Dist. of Liberty*, 53 Iowa, 585, it was held that the remedy of a teacher who was wrongfully discharged by a board of directors for incompetency was by appeal, and that he could not at once maintain an action for breach of the contract under which he was employed as a teacher.

It appears to me that this is a case where the remedy by appeal is peculiarly appropriate. The controversy is one concerning the proper government of the school, and it should be determined by the tribunal appointed by law to settle such questions. If resort can be had to the courts without first appealing to the county superintendent and from him to the state superintendent the law allowing an appeal becomes a dead letter and wholly useless and inoperative.

Smith v. McFadden.

The cases cited in the majority opinion, it appears to me, have no bearing upon the question as to whether the action of *mandamus* is the proper remedy. No such question was made in the pleadings nor upon trials below, nor upon appeal in this court. The mere fact that those actions were in form proceedings in *mandamus*, and the court did not of its own motion refuse to entertain jurisdiction, cannot be held as determining that *mandamus* was the proper remedy.

In my opinion the ruling of the court below upon the demurrer was correct, and I am authorized to say that SEEVERS, J., concurs in the views which I have herein expressed.

SMITH V. MCFADDEN.

1. **Estate: ALLOWANCE OF CLAIM: ADJUDICATION.** The fact that a claim filed against an estate is allowed by the administrator in a sum smaller than that claimed, and such allowance is entered by the clerk and approved by the court, will not constitute an adjudication which will prevent the claimant from demanding a trial as to the portion of the claim not allowed.
2. —: —: **WHEN BARRED.** A claim of the third class against an estate is not barred because not proved up until after the expiration of twelve months from notice of the appointment of an administrator.
3. —: —: —. A delay to bring a claim on for hearing will not operate as an estoppel to prevent its being proved unless the estate has been prejudiced by the delay.
4. **Practice in the Supreme Court: FILING OF ARGUMENT.** Facts considered under which it was held that an argument would not be stricken from the files, but not being filed within the time prescribed the cost of printing should be taxed to the party making it.

Appeal from Cass Circuit Court.

MONDAY, JUNE 20.

O. C. Keith, H. Ransford and W. L. Brown executed their joint and several notes to the plaintiff; Brown died, and on March 18, 1876, Keith was appointed administrator of the es-

53	482
81	158
56	482
83	596
56	482
87	350
56	482
93	30

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tate. On the 29th day of July thereafter the plaintiff filed his claims duly verified against the estate, in which he claimed the amount due on said notes. On August first, 1876, there was indorsed thereon the following: I, O. C. Keith, administrator of said named estate, being fully satisfied with the correctness of the within named claim to the amount of \$500 do with the approbation of the court admit and allow the same in the sum of \$500.

O. C. KEITH, *Administrator.*

On December 29th, 1876, the clerk approved said allowance and duly entered the same of record. Afterward the action of the administrator was approved by the court.

In April, 1878, the plaintiff filed a petition in said court stating such of the matters aforesaid as he deemed material and asking that the claim filed as aforesaid be examined and the amount due thereon allowed as a fourth class claim.

In an amendment to the petition, he asked that the claim be established as of the third class. It is uncertain whether Keith was served with notice of the filing of said petition.

In May, 1878, he made a report to the court and was discharged as administrator and S. T. McFadden was appointed such in the place and stead of said Keith. The said McFadden was substituted as defendant. An appearance was entered for him and an answer filed. There was a trial to the court, the amount due plaintiff ascertained and the same allowed as a third-class claim against the estate. The defendant appeals.

John W. Scott, for appellant.

John Ledwich and *A. S. Churchill*, for appellee.

SEEVERS, J.—The amount claimed to be due the plaintiff on the notes was much greater than the amount allowed by the administrator, and counsel for the defendant insists the allowance made, and the approval of the same by the clerk and court, amounts to an adjudication of the whole claim, and that as such adjudication has not been set aside or appealed from the subject matter can-

1. ESTATE: allowance of claim: adjudication.

Smith v. McFadden.

not be again adjudicated. Whether this is so depends upon the statute. It is provided: "Claims against the estate shall be clearly stated, sworn to and filed, and ten days notice of the hearing thereof, accompanied by a copy of the claim, shall be served on one of the executors unless the same have been approved by the administrator, in which case they may be allowed by the clerk without notice. All claims filed and not expressly admitted in writing, signed by the executor with the approbation of the court, shall be considered denied without any pleading on behalf of the estate." Code, § § 2408-2410.

All that is required in the first instance on the part of the claimant is to make out the claim, verify, and file it.

He is not bound to notify the administrator he has done so. The latter must take notice of all claims filed, and approve or allow the same if he sees proper, as provided in the statute. The administrator is not required to indorse on a claim that he will not allow it, or that he rejects it. If he fails to approve the claim it is regarded as denied by operation of law, and thus an issue is formed. But before the court obtains jurisdiction or the power to decide as to the correctness of the claim, the claimant must serve a notice on the administrator when the issue thus formed will be heard, or when he will prove up the claim.

By filing the claim it may be said action on the part of the administrator is invoked, but clearly the court is not called upon to do anything. Whatever is done by the administrator, that is if he allows any part of the claim, this may be satisfactory to the claimant and it is not the policy of the law that litigation shall be commenced until opportunity has been afforded the representative of the estate to examine the claim and allow it if he sees proper to do so, and thus save cost and expense.

The action of the administrator in allowing part of a claim cannot be regarded as an adjudication of the whole; for the statute provides unless the claim has been approved the claim-

ant may bring the case to a hearing. This clearly contemplates that unless the whole claim has been allowed there may be a hearing before the court.

Before the court can obtain the power to determine whether the claim should be allowed its jurisdiction must be invoked in some manner. Ordinarily this would be done by the claimant serving the notice signed by the statute. But it may be the administrator could do so. If neither does so then there cannot be an adjudication which will be binding on either party.

In the case at bar it may be the allowance of \$500 should be regarded as an adjudication of the claim filed to that extent. At least the plaintiff does not claim that it is not. As to the residue of the claim there was no adjudication and the plaintiff had the right to bring the same to a hearing as he did.

The general rule insisted on by counsel is undoubtedly well established and supported by the authorities cited. It, however, has no application because the statute must control.

II. The statute provides that demands against the estate are payable in the following order.

1. * * * *
2. * * * *

3. Claims filed within six months after the first publication of the notice given by the executors of their appointment.

4. All other debts.

5. * * * *

All claims of the fourth of the above classes not filed and approved within twelve months of the giving of the notice aforesaid are forever barred * * * *. Code, §§ 2420, 2421.

Counsel for the appellant insist the claim is barred under the foregoing statute. This point is not, we think, well taken because the claim was filed within six months after ² when barred. the first publication of the notice given by the administrator of his appointment.

Smith v. McFadden.

It therefore is a claim of the third class, and the statutory limitation only applies to claims of the fourth class. There being no statutory bar the claim could be proved up after the expiration of the twelve months aforesaid. *Goodrich v. Conrad*, 24 Iowa, 254.

III. If we understand counsel for the appellants he insists that by reason of the delay in bringing on the hearing a. —: —: the plaintiff has lost his right to do so, and because of his negligence he should be estopped from now proving up his claim. It does not appear the estate has been in any respect damaged or injured, by the delay, except that during the delay the co-obligors with Brown have become bankrupt.

Ordinarily mere delay in bringing suit does not operate as a bar or estoppel, unless thereby the case is within the statute of limitations. It may be that under peculiar circumstances equity has refused relief when the delay has been great, but clearly, we think, there has been no such delay in this case. The notes being joint and several the plaintiff had the right to bring an action against all or any one of the obligors or the legal representative of any one who may have died. Code, § 2550; *Sellon & Co. v. Braden*, 13 Iowa, 365. This being so the bankruptcy of one obligor could in no manner affect the right to recover against another.

The plaintiff filed the notes in the bankrupt court against the estates of the bankrupts. This he had the right to do, and his right to proceed in this case under the statutes just cited must be clear and cannot, we think, be doubted.

III. It is insisted the indebtedness to the "plaintiff was a partnership debt, created for the use and benefit of the co-partnership, and the payment thereof in any case from the separate estate of the deceased partner should be deferred to the payment of all his private creditors."

The consideration of the notes was certain real estate sold and conveyed to the obligors by the plaintiff. The notes on their face do not indicate this was a partnership transaction.

We have examined the evidence with care, and are united in the opinion the notes were not given for a partnership indebtedness. No beneficial result would be reached by setting out the evidence or stating our reasons at length.

IV. O. C. Keith was introduced as a witness by the plaintiff, who asked him the following questions. "You may relate as nearly as you can how you arrived at the amount of the allowance of this claim of Mr. Smith's and state what part Mr. Ransford took in making this allowance." The plaintiff's objection to this question on the grounds the evidence sought to be elicited was immaterial and incompetent was, we think, rightly sustained. It was competent for Keith to state any facts tending to show what amount, if anything, was due the plaintiff. But clearly it was not competent for him to state the reasons or why he concluded only the amount allowed by him was due.

The part taken by Ransford in relation to the amount allowed could not be binding on the plaintiff unless Ransford was his agent, charged with some duty connected with the allowance of the claim. At most Ransford was the agent of the plaintiff only for the purpose of presenting or seeing the claim was filed. He was not vested with any further authority in reference to said claim. This being so, what he did or said could not prejudicially affect the plaintiff.

V. Counsel for appellant moves to strike from the files "appellee's additional argument" on the grounds: First. It was filed too late: Second. It is largely if not wholly unsupported by the record; and Third. A part is scandalous.

4. PRACTICE in
the supreme
court.

Conceding the second ground to be true we would not strike the argument from the files. Counsel for the appellee, it must be presumed, claimed the argument was supported by the record, and the motion assumes it is partly so supported. We incline to think counsel for the appellee in the heat of argument has used expressions and made an intimation which is not supported by the record in relation to counsel for

Smith v. Riggs.

appellant. This is to be regretted and condemned. But we do not think under the circumstances that any beneficial result would be accomplished by striking said argument from the files. As we understand, an order was made at the Council Bluffs term that the additional argument should be filed in ten days. It was not filed until a few days after such time had expired. We do not feel willing, however, to strike the argument from the files, because we earnestly desire to have before the case is determined all that counsel may see proper to say. But while this is so counsel must understand that the orders and rules of the court must be obeyed. As no excuse is offered why said argument was not filed in time the cost of printing the same must be paid by appellee.

AFFIRMED.

SMITH V. RIGGS ET AL.

1. **Fraudulent Conveyance:** WHAT IS NOT: PAYMENT OF DEBT. A conveyance of land by a debtor to a creditor in payment of his debt, although made in acceptance of a voluntary proposition by the creditor that he would convey the land to the debtor's wife, who was his daughter, as a gift or advancement, was held not to be fraudulent as to other creditors of the grantor.

Appeal from Mahaska District Court.

MONDAY, JUNE 20.

THE defendants recovered a judgment against A. M. Saunders, caused an execution to issue and were about to sell certain real estate belonging to the plaintiff, as he claims, and asked that an injunction issue restraining the sale. The decree was for the plaintiff and the defendants appeal.

Lafferty & Johnson and Bolton & McCoy, for appellants.

M. E. Cutts and C. P. Searle, for appellee.

SEEVERS, J.—We find the facts to be that the wife of A. M. Saunders is the daughter of Thomas Thornburg, and that previous to 1874 Thornburg let Saunders have about \$2,500 in money, for which Saunders gave his notes. It was in the power of Thornburg to have enforced the payment of the notes at any time, and we find said indebtedness cannot be regarded as an advancement, but that the relation of debtor and creditor existed between Thornburg and Saunders.

In 1874 Saunders owned the real estate in controversy and was indebted to the defendants and others. Thornburg knew of at least a portion of said indebtedness, and was apprehensive the creditors of Saunders would seize the real estate, appropriate the same to the payment of their debts, and thus deprive his daughter of a comfortable support. He proposed to Saunders he would give up said notes and cancel the indebtedness and if he, Saunders, would convey to him the real estate that he would convey the same to Mrs. Saunders as an advancement or gift. This was agreed to and the arrangement perfected.

Afterward the defendants recovered judgment against Saunders and afterward Mrs. Saunders and her husband conveyed the real estate to the plaintiff, who had knowledge of the transaction between Saunders and Thornburg.

There is no pretence the plaintiff did not pay the full value of the real estate at the time he purchased. Nor is it claimed the indebtedness from Saunders to Thornburg was not equal to the value of said real estate. After the conveyance to Mrs. Saunders her husband managed and controlled the real estate as he had done before that time.

The defendants insist the transaction which resulted in the conveyance to Mrs. Saunders is fraudulent and void because made to hinder and delay creditors. Counsel for the appellants do not controvert the proposition that the diligent creditor has the right to secure himself, although the intent of the

debtor may have been to hinder and delay his creditors, or that such is the result of the transaction, but they insist such rule has no application because the conveyance to Thornburg was coupled with the condition or "secret trust as a cover" that he should convey to Mrs. Saunders, and that the transaction as a whole was beneficial to Saunders, was so intended, and that he thereby obtained in the real estate a homestead right of which he could not be deprived without his consent, and that by the conveyance he acquired an inchoate right of dower.

In support of their proposition counsel cite and largely rely on *Kissam v. Edmondson et al.*, 1 Ired. Eq., 180. There is, we think, a clear distinction between the case cited and that at bar. In the former the debtor insisted against the earnest protest of the creditor that one half of the amount due should be secured to the wife and children of the debtor. The provision made was not accomplished because the creditor bestowed upon the wife of the debtor a bounty, but it was done because the debtor so insisted and refused to secure any portion of the debt unless such provision was made. The creditor consented only for the reason he could not otherwise secure any portion of his debt. The opinion concedes that the creditor may give his property or debt to whom he pleases, and if the provision made for the wife and children of the debtor had been made by the creditor and was a gift or bounty freely bestowed by him that such transaction would not have been fraudulent.

In the case at bar the bounty or gift to Mrs. Saunders was conferred by her father. The debt belonged to him and in payment thereof Saunders conveyed the real estate. The latter neither made or suggested the conveyance to his wife. Nor did he convey to Thornburg upon the condition the latter would convey to Mrs. Saunders. If Thornburg had given the notes of Saunders to his daughter the latter would have been the creditor of her husband and he could have conveyed the real estate to her in payment of such indebtedness. Such

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a transaction would not have been fraudulent because it would have been no more than a preference of one creditor to another. In legal effect the transaction amounted to this and nothing more.

Thornburg had the legal right to secure his debt and he could well say to Saunders, "if you will convey me real estate in payment I will convey the same to your wife." The gift in such case was his and not that of Saunders.

The fact that by reason of the conveyance Saunders incidentally obtained a homestead right or an inchoate right of dower is not, we think, material. He did not stipulate therefor, but it is a mere incident attached to the estate by law, which was cut off by the sale and conveyance to the plaintiff. The purchase money became the absolute property of Mrs. Saunders. An incident which springs from or is attached to the relations existing between husband and wife cannot make a transaction fraudulent which would not be so regarded if such relation did not exist.

We are unable to discover any difference between this case and *Cauntton v. Doby et al.*, 10 Richardson, S. C. Eq., 411, and the foregoing views are sustained thereby.

AFFIRMED.

ON REHEARING.

SEEVERS, J.—In their petition counsel insist the statement in the foregoing opinion, "Nor did he convey to Thornburg upon the condition the latter would convey to Mrs. Saunders," is incorrect. We do not deem it material to controvert the position of counsel, but conceding it to be true, it is evident the legal thought of the opinion would in no respect be changed thereby. Upon a reconsideration of the case we adhere to what is said in the opinion that Thornburg could well say to Saunders, "If you will convey me the real estate in payment I will convey the same to your wife." Counsel also complain they cited Bump on Fraudulent Conveyances, 224, and seem to think if said authority and others cited had been

Rowley v. Jewett.

examined the result would have been different. Counsel err in the belief the authorities cited were not examined. The only reason they were not cited was they were not believed to be applicable. The general rule is stated in *Bump on Fraudulent Conveyances*. This no one disputes. In support of it the author cites *White v. Graves*, 7 J. J. Marsh., 523; *Garland v. Reeves*, 4 Rand., 282; *Pettibone v. Stevens*, 15 Conn., 19, and *Kissam v. Edmondson*, 1 Ired., 180. A reexamination of these cases satisfies us our former conclusion, that in none of them except the last can it be said the facts are like those in the present case, is correct. We have considered all that has been said by counsel and our conclusion is that the former opinion must be adhered to.

ROWLEY V. JEWETT.

1. **Bond:** FOR DELIVERY OF ATTACHED PROPERTY: WHO MAY ENFORCE. Under section 2787 of the Revision an attachment plaintiff or his assignee may maintain an action on a delivery bond.
2. —; —: INTERLINEATION IN. An interlineation in a delivery bond giving a description of the attached property, made in good faith by the officer to whom the bond is presented for acceptance, at the request of the principal in the bond, is not a material alteration and will not release a surety from liability thereon.
3. —; —: SURETY. A surety in a bond, who releases property held by him as indemnity upon the statement of the obligee that he has received payment of the amount secured by the bond, is released from liability thereon only to the extent of the value of the property released, which it is incumbent on him to establish. BECK, J., *dissenting*.

Appeal from Polk Circuit Court.

MONDAY, JUNE 20.

HOYT SHERMAN sued out an attachment against one Stamper, which was placed in the hands of the plaintiff for service, and he thereunder attached certain personal property belonging to said Stamper. Whereupon the latter and the

56	492
89	117
56	492
83	283
56	492
85	627
56	492
88	729
56	492
91	680
56	492
96	494
56	492
105	556
56	492
107	400
107	469
56	492
129	482
56	492
136	220

 Rowley v. Jewett.

defendant as his surety executed to the sheriff the delivery bond upon which this action was brought. It was alleged in the petition that Sherman had obtained judgment, and that neither Stamper or the defendant had delivered said property to the sheriff as required by the conditions of the bond, but had wholly failed, although often requested to do so, and that the sheriff being liable to produce said goods or satisfy said judgment, and the plaintiff being liable to account to the sheriff for his acts in the premises, and to pay said bond, * * did himself pay off and satisfy said judgment. * *” The allegations of the petition were denied by the defendant, and the trial was to the court. Judgment for the plaintiff, and defendant appeals.

Barcroft, Given & McCaughan, for appellant.

Phillips, Goode & Phillips, for appellee.

SEEVERS, J.—I. The evidence warranted the Circuit Court in finding the plaintiff purchased the judgment of Sherman, and the same was duly assigned to him. This being so, the plaintiff, we think, became thereby vested with all the rights of Sherman as to the enforcement or collection of the judgment. If, therefore, Sherman could maintain and resort to an action on the bond to enforce the collection of the judgment before the assignment the plaintiff could do so afterward.

It is provided by statute that “when a bond * * given to any officer * * is intended for the security of * * particular individuals suit may be brought thereon in the name of the person intended to be thus secured, * *” Code, § 2552. This section in substance was copied from Rev. § 2787, and is literally the same as § 1893 of the Code of 1851. The bond sued on was given when § 3219 of the Rev. was in force. This last section in substance is the same as § 1876 of the Code of 1851. It will be seen the statutes in force now, when the bond was given, and when *Sheppard &*

1. BOND: for delivery of attached property; who may enforce.

Rowley v. Jewett.

Morgan v. Collins, 12 Iowa, 570, was decided, are in substance the same, and it was held in that case, which was a suit on a bond of the same character as the one sued on, that such bond was given for the security of the plaintiffs in attachment, and they could maintain an action thereon. We are not disposed to depart from the construction of the statute adopted in the cited case. It follows, therefore, that Sherman could have maintained an action on the bond, and this the plaintiff may do as the assignee of the judgment.

It is immaterial what constituted or was the inducing cause that moved the plaintiff to purchase and procure an assignment of the judgment. He nevertheless is the owner thereof and entitled to the rights of such. It is possible that evidence tending to show the purchase and assignment was inadmissible under the allegations of the petition, but no objections were made thereto. Had there been, no doubt if deemed necessary the plaintiff would have amended his petition.

II. The bond is of a penal character, and at the time it was signed by Stamper and the defendant was conditioned as follows: "The condition of the above obligation is such that the said sheriff did on or about the twenty-first day of November, 1870, attach the furniture and photographic outfit of said F. M. Stamper to satisfy a claim * * * in favor of Hoyt Sherman. We obligate ourselves * * * to cause said attached goods or their value to be delivered to said sheriff within twenty days after the rendition of any judgment in favor of Hoyt Sherman on the above claim against said property."

Stamper presented this bond to the plaintiff, and before he accepted it the plaintiff in good faith, with honest intent and at the request of Stamper, for the purpose of identifying the property attached, interlined therein immediately after the name "Stamper" the following, "consisting of six sofa chairs, one settee, one round table, one clock, one mirror, one

show case, one piece of carpet containing forty-nine yards, twenty large pictures and frames, and one half-size camera."

The defendant insists there was another interlineation, but as to this there was a conflict in the evidence. We therefore cannot find it to be true.

When the bond was thus interlined and delivered the attached property was released. The interlineation described the property in the precise terms of the return on the attachment.

The interlineation was made without the knowledge or consent of the defendant, and his counsel insist the bond by reason thereof is void as to him.

We are of opinion the legal effect of the bond was not changed by the interlineation. No one obtained any advantage, nor was any one injured thereby. If it had not been made the property could have been readily identified by the return on the attachment, and this was the property the obligors bound themselves to return to the sheriff. When described in the bond as was done by the interlineation its effect may have been to make additional evidence of the property attached. If so, such was not the intent of either Stamper or the plaintiff, and if such was the intent it does not follow the bond for this reason was rendered void. *Adams et al v. Frye*, 3 Met., 103.

As the interlineation was not material, and did not affect the operation of the bond or the rights of the parties, and was not made with any wrong or fraudulent intent, but in good faith, it should not render the bond void. Such is the rule in this State, and is believed to be in accordance with the weight of modern authority. *Robinson v. Phoenix Insurance Co.*, 25 Iowa, 430; *Briscoe v. Reynolds*, 51 N. C., 73.

III. At the time the defendant signed the bond Stamper gave him a "three-spring wagon" to make good any loss a —: —: "he might sustain on the bond." The defendant sureties. had a conversation with Sherman and asked him

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if "those Stampers had settled this matter, and the answer was, it is all paid: I have got my money."

Counsel for defendant insist because of the foregoing facts he is wholly discharged, although no evidence was introduced tending to show the value of the wagon, or that the defendant in consequence of what Sherman said made no efforts to indemnify himself from loss, or that he could then have obtained further indemnity.

The question for determination is whether the defendant was wholly discharged or only to the extent of the value of the property surrendered. In *Harris v. Brooks*, 21 Pick., 195, there was evidence tending to show the holder of the note informed the surety he would look to the principal, and that the surety need not give himself any further trouble about the note, for he should not be injured.

The court instructed the jury if, in consequence thereof, the surety omitted to take up the note, and secure himself out of the property of the principal, he was discharged.

The instruction was approved, the stated ground being "that it lulls the party into security and prevents him from obtaining indemnity, and it would be a fraud on the part of the holder after making such assurances to call upon the surety."

This case was followed by *Carpenter v. King*, 9 Met., 511, the facts being substantially the same. To the same effect is *Thornburgh v. Madren*, 33 Iowa, 380. As sustaining the conclusion in the last case, *Chambers v. Cochran & Brock*, 18 Iowa, 187, is cited, in which Dillon, J., at some length, discussed the question before the court, and from an examination of the authorities, reaches the conclusion: "If the creditor admits to the surety that he is paid this admission is conclusive, provided the surety *acts upon it*, and would be made to suffer by the creditors controverting the truth of the admission," and that if the "surety relying upon this conduct, and these acts of the plaintiff, had relinquished securities, or failed to obtain security, or had otherwise been dam-

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nified it would to the extent of such damage have been a discharge." This is in accord with *Brubaker v. Okeson*, 36 Pa. St., 519; *Driskill v. Maters*, 31 Mo., 525.

The rule, therefore, seems to be if the surety has been lulled into security by the acts and conduct of the creditor, and in consequence thereof fails to obtain indemnity or make an effort to do so, he is wholly discharged, but if he only surrenders certain property held by him as collateral security to the principal debtor, and has not been otherwise damaged, he is discharged only to the extent of the value of the property surrendered. The defendant is brought within the last rule only.

As the value of the wagon was not shown it cannot be said the defendant has been damaged except nominally. The judgment should not be reversed because such damages were not allowed, if it be conceded such was not done. *Watson v. Van Meter*, 43 Iowa, 76.

AFFIRMED.

BECK, J., *dissenting*.—I cannot concur in the foregoing opinion of the majority of the court. I have not the time to enter into an extended discussion of the point upon which I differ from the other justices, and must content myself with a brief statement of my conclusions.

The opinion of the majority concedes that the plaintiff stands in the shoes of Sherman. I reach the conclusion, however, upon this ground, that, inasmuch as defendant acted upon the declaration of Sherman that the judgment had been paid, in surrendering the spring wagon, plaintiff is estopped to deny the payment of the judgment. The doctrine of estoppel being applicable to the case, we will not inquire what was the value of the property surrendered. If of any value it supports the estoppel.

The case differs from cases wherein the creditor surrenders property held as security for the debt for which the surety is bound. The surety in such cases can claim nothing more

The Town of New Hampton v. Conroy.

than that the debt be regarded as paid *pro tanto*, to the extent of the value of the security surrendered. In this case the estoppel compels us to regard the whole debt as paid—that is, the declaration of the creditor that it is paid cannot be denied. In my opinion the authorities support the conclusion I have announced. See *Carpenter v. King*, 9 Met., 511, and notes to this case by Hare & Wallace, found in 2 American Leading Cases, pp. 380, 423, 434, 425, and authorities cited. The doctrine of estoppel may be invoked to protect a surety in an action at law, the same as in chancery. *Carpenter v. King*, *supra*; Leading Cases in Equity, Hare & Wallace's notes, p. 546.

56	498
80	119
56	498
122	214
56	498
131	496

THE TOWN OF NEW HAMPTON V. CONROY ET AL.

1. **Municipal Corporations: REGULATING SALE OF WINE AND BEER: CONDITIONS IMPOSED.** A city or town incorporated under the general law has no power to enact provisions in an ordinance intended to regulate the sale of wine and beer, making it a condition of the granting of a license therefor that the person to whom it is issued shall not sell liquors the sale of which is prohibited by the laws of the State, nor suffer or permit gambling on the premises occupied by him, and imposing penalties for the violation of such conditions, to be collected by action on the bond of the licensee. An ordinance so providing is void, and no action can be maintained on the bond to recover such penalties. BECK, J., *dissenting*.

Appeal from Chickasaw District Court.

TUESDAY, JUNE 21.

THE plaintiff is incorporated under the general incorporation law. The town council passed an ordinance providing that no person should sell any vinous or malt liquors without having obtained a license from the authorities of the town. It was provided the applicant for such license should execute a bond in the penal sum of one thousand dollars, conditioned

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he would comply with all the provisions of the ordinance, among which was that no gambling should be permitted on the premises covered by the license, nor should any intoxicating liquors other than vinous or malt be sold thereon. For each and every violation of the provisions of the ordinance there should be forfeited and paid to the plaintiff, by the person to whom the license was granted, the sum of one hundred dollars.

The defendants Conroy & Dorgan applied for and there was issued to them a license in accordance with the provisions of the ordinance. They and the other defendants as their sureties executed a bond as provided therein, which was conditioned in substance that said Conroy & Dorgan would not suffer or permit any gambling, and would not sell any intoxicating liquors except vinous and malt on the premises described in the license. This action is brought on said bond, and the breaches alleged are that gambling was permitted, and intoxicating liquors other than vinous and malt were sold on said premises. There was a demurrer to the petition, which was sustained, and plaintiff appeals.

Powers & Kenyon, for appellant.

No appearance for appellee.

SEEVERS, J.—I. The sale of intoxicating liquors other than vinous and malt is prohibited by the laws of the State.

1. MUNICIPAL Cities and towns incorporated under the general corporations: regulating sale of wine and beer: conditions imposed. incorporation law have the power "to regulate, license, and tax or prohibit beer and wine saloons, * * and to regulate or prohibit the sale of intoxicating liquors not prohibited by the State." Chapter 24, Laws of Sixteenth General Assembly; Miller's Code, § 463.

As we construe this statute, the plaintiff was prohibited from passing any ordinance regulating or prohibiting the sale of intoxicating liquors other than wine and beer. If in

attempting to carry out powers clearly conferred penalties have been attached to acts over which the plaintiff did not have jurisdiction, the ordinance so providing is void, and cannot be enforced.

Any ordinance which prescribes needful rules and regulations in relation to the sale of wine and beer within their limits may undoubtedly be enacted by cities and towns. The provision, whatever it may be, must relate to the sale of wine and beer. The ordinance in question, under the pretense of regulating the sale of wine and beer, provides penalties for the sale of other intoxicating liquors. How can it be said such penalties regulate or can have any effect on the sale of wine and beer. The power to prohibit is just as clearly granted as that to license or regulate. Now, suppose an ordinance should be passed prohibiting the sale of wine and beer, and it also provided that any one selling other intoxicating liquors should forfeit and pay one hundred dollars for each violation of the ordinance. Could such an ordinance be enforced? We are of the opinion it could not. No distinction in principle can be drawn between such an ordinance and the one in question. The case of *Hurber v. Baugh*, 43 Iowa, 514, is distinguishable because the ordinance in that case regulated and had reference to the sale of wine and beer only.

II. Authority is conferred on cities and towns to "authorize the destruction of all instruments and devices used for the purpose of gaming." Code, § 456. The ordinance provides that any person who obtains a license and permits on the premises described in the license "any gambling or gaming for money" shall forfeit and pay the sum of one hundred dollars for each violation of the ordinance. The offense described in the ordinance is a crime, and punishable as such under the laws of the State.

The only power conferred on the plaintiff is to authorize it to provide by ordinance that all instruments and devices used for the purpose of gaming should be destroyed. No

The Town of New Hampton v. Conroy.

power is conferred to punish any one or prescribe penalties for permitting gambling or engaging therein, and yet this is what the ordinance does.

A similar ordinance under a statute much like the foregoing was held to be void in *The City of Mount Pleasant v. Breeze*, 11 Iowa, 399. Nor is there any distinction in principle between the case at bar and *The City of Chariton v. Barber*, 54 Iowa, 360. These cases are distinguishable from *Town of Bloomfield v. Trimble*, 54 Iowa, 399, on the ground that in the latter no express authority was conferred on the plaintiff to punish any person for drunkenness, nor was the same prohibited. Therefore, it was held under the general powers conferred on cities and towns by Code, § 482, the plaintiff might declare drunkenness an offense, and punish any one who violated the ordinance. But in the case at bar the power expressly conferred negatives the thought the plaintiff can punish by ordinance any person who may permit gambling otherwise than prescribed by statute. In our opinion the ordinance is void, and the demurrer was correctly sustained.

AFFIRMED.

BECK, J., *dissenting*.—I. I am unable to concur in the foregoing opinion. It cannot be doubted that under the statute authorizing cities and towns to license and regulate the sale of wine and beer, the municipal corporations, by ordinance, may prescribe the places in which such liquors may be sold; may forbid sales thereof on certain days and at certain times; may prescribe that persons of bad character, or given to unlawful practices, shall not have licenses; and may impose upon persons licensed the duty of keeping orderly houses and require them to refrain from violation of law.

The plaintiff in this case, it seems, determined that those who violated the law by the sale of spirituous liquors and by keeping gambling houses were not fit persons to receive licenses for the sale of wine and beer. In order to enforce this

very fit and proper regulation, it required the licensees to execute bonds—conditioned that they would not sell spirituous liquors, nor permit gambling. These bonds were required as means for the proper regulation of wine and beer saloons.

II. The opinion of the majority of the court holds that the ordinance, in providing for the bond, prohibits or regulates the sale of spirituous liquors, and the keeping of gambling houses, and prescribes a punishment therefor. This is the error of the opinion. I am at a loss to understand how it can be held that the ordinance forbids or regulates the sale of spirituous liquors and the keeping of gambling houses. It simply provides in effect that those who violate the State law by so doing shall not be licensed to sell wine and beer. This is a regulation of the sale of wine and beer, and not a regulation of the sale of other liquors. This proposition to my mind is plain. To secure the enforcement of the ordinance, and as a means of regulating licensed saloons so that only such persons as are deemed fit may sell beer and wine, the bond is required. If its conditions are forfeited, the penalty may be recovered. The recovery of the penalty is not a punishment for the violation of the State law, but is based upon a contract whereby the obligor bound himself to obey and observe the regulations prescribed by the city for wine and beer saloons.

III. If it be conceded that the provisions of the ordinance prescribing a penalty for its violation, by the sale of spirituous liquors and by permitting gambling, is to be regarded as fixing a punishment for an offense under the laws of the State, and is therefore void, it does not follow that this action cannot be maintained. It is not brought to recover the penalty prescribed by the ordinance, but is prosecuted upon the bond. If the ordinance be valid in its other provisions relating to the bonds required of licensees, it will be sustained and enforced so far as it is valid. It is a familiar rule that an ordinance partly valid and partly void will be sustained as to all

The Town of New Hampton v. Conroy.

its valid provisions; its invalid provisions only will not be enforced.

But in my opinion the penalty of \$100, prescribed in an ordinance for its violation, is not to be regarded as a punishment for violations of the law of the State forbidding the sale of spirituous liquors and the keeping of gambling houses. The ordinance provides for the punishment of selling spirituous liquors and permitting gambling *in wine and beer saloons*. The acts forbidden by the ordinance are not offenses under the laws of the State. Under the ordinance the offense consists in doing the forbidden acts *in a wine and beer saloon*. No such element of the offenses of selling spirituous liquors and permitting gambling is recognized in the statutes of the State. The ordinance, therefore, does not provide for the punishment of an offense known to the laws of the State.

The views I have expressed upon this point are based upon the facts as stated in the majority opinion, which, I think, hardly presents the case made by the record before us. The town ordinance provides that recovery may be had upon the bond executed by the licensee for the penalty, \$100, prescribed for the sale of spirituous liquors by him. It therefore clearly appears that the ordinance provides for the recovery, not of a fine fixed as a punishment for the violation of the ordinance, but for the penalty of the bond. The distinctions between a fine and a penalty provided for by a contract are obvious.

IV. The doctrines of the foregoing opinion, in my judgment, will lead to mischievous results. They take from the cities and towns the most efficient means of regulating wine and beer saloons. They reach further. Under them a bond executed by a municipal officer, in pursuance of a city ordinance, for the safe keeping of and accounting for money of the city, cannot be enforced if such officer should embezzle the city's funds, for the reason that he would be guilty of a crime under the laws of the State, and the recovery of the penalty of the bond would be a punishment of such crime.

Sigler v. Hidy.

I have not time to more than present the grounds of my objections to the foregoing opinion. I cannot now support my position by arguments. It is my opinion that the judgment of the District Court ought to be reversed.

SIGLER V. HIDY ET AL.

56	504
80	552
56	504
81	536
56	504
118	29

1. **Practice: PLEADING: COUNTER CLAIM.** In an action on a promissory note a defendant may by counter claim attack the validity of the note and ask an affirmative judgment in his favor, and such counter claim will not be rendered inadmissible by the fact that it is in the nature of a petition in replevin, and prays possession of the note, such relief being equivalent to its cancellation.
2. ———: **COUNTER CLAIM: DISMISSAL OF ACTION.** The dismissal of an action on a promissory note without prejudice by the plaintiff will not entitle him to a dismissal of a counter claim asking a cancellation of the note.

Appeal from Decatur Circuit Court.

TUESDAY, JUNE 21.

THIS action was brought to recover upon a promissory note executed by the defendants, Solomon Hidy and D. K. Maxwell, to the Farmers' Manufacturing Co., and indorsed to the plaintiff. The defendants for answer averred that the note was obtained by fraud, that it was without consideration, and that it had been altered in a material respect by an erasure. The plaintiff for reply denied the averments of the answer.

The defendants filed what they call a counter claim setting up substantially the same facts averred in their answer, and averring also that they are entitled to the possession of the note and that the same is wrongfully detained by the plaintiff. They also aver that the value of the note is \$200, and that the alleged cause of detention is that the plaintiff claims to own the note, and they aver that they have been damaged by reason of the wrongful detention in the sum of \$50. They

 Sigler v. Hidy.

pray for judgment for possession of the note, and in case it cannot be found that they have judgment for \$500 and costs.

Afterwards the plaintiff dismissed his action without prejudice and made an oral motion that the counter claim be dismissed, which motion the court sustained, to which the defendants excepted. From the order dismissing the counter claim the defendants appeal.

Stuart Brothers, for appellants.

Willson Brothers & Mitchell, and *Nourse, Kauffman & Jackson*, for appellee.

ADAMS, CH. J.—The appellee insists that the counter claim was properly dismissed because it was in the nature of an action in replevin to recover possession of the note, and that conceding the averments of the counter claim to be true, the appellants were entitled only to a cancellation of the note, and certainly not to possession until a judgment of cancellation had been rendered.

As the appellants in their counter claim set up that the note has been altered, and as it would be the right of the appellee to produce the note in evidence for the purpose of showing, if such was the fact, that it did not appear to have been altered, we are inclined to think that it was the right of the appellee to hold the note as his evidence until judgment had been rendered.

But this question does not arise. The appellants did not demand the immediate delivery to them of the note. They did not indeed put themselves in position to demand it. They certainly could not obtain a writ of replevin or order for the immediate delivery to them of the note without filing a bond, and no bond was filed. The counter claim, then, contemplated that the note was to remain in the hands of the appellee until the rendition of the judgment.

That the appellants were entitled to a judgment of cancellation if sought in the proper way, and if the facts averred

1. PRACTICE:
pleading:
counter
claim.

Sigler v. Hidy.

are true, could not, we think, be denied. Now while the appellants do not pray for cancellation, but for possession, we cannot think that the judgment they pray for would in any way impair the appellee's rights if the note ought to be canceled. A judgment for possession might, we think, be regarded only as a more effective mode of reaching the same result which would be reached by cancellation.

We have, then, the question whether in a counter claim the appellants may attack the validity of the note and ask for an affirmative judgment in their favor of such character as shall protect them hereafter against any action upon the note. In our opinion they can.

A counter claim may be set up where the defendants have a cause of action connected with the subject of the action. Code, § 2659, subdivision 2. In *Revere Insurance Co. v. Chamberlin*, *post*, 508, the subject of an action was held to be the thing or subject matter to which the litigation pertains. In this case then the subject of the action was the note. The appellants' counter claim is certainly connected with it, being set up for the purpose of obtaining possession of the note.

But it is said by the appellee that the counter claim is in the nature of replevin; that under the Code, section 3226, there cannot in an action of replevin be a counter claim; that as the provision must have been based upon the supposed inconsistency of allowing the defendant to demand by counter claim a money judgment against the plaintiff, who was demanding nothing but the possession of property, so there would be the same inconsistency where the plaintiff demands a money judgment to allow the defendant by way of counter claim to demand the possession of property.

To this we think it may be said that section 2659, above cited, appears to be broad enough to allow this counter claim, and it is not expressly excluded by any provision. Nor do we think that it can be excluded merely upon principle, for, while the counter claim is upon its face in the nature of a

possessory action, it differs from ordinary possessory actions. Where the possession of a note is sought by the maker it is not because he claims to be entitled to it as property so far as his relation to it is concerned, but because he is entitled to be protected against it as evidence of a claim. Possibly in such case the maker should be allowed to seek only the cancellation of the note, but in *Savery v. Hays*, 20 Iowa, 25, it was held that the maker of a note may maintain replevin where he is entitled to cancellation. But because he may bring a possessory action, it must not be forgotten that it is only for the purpose of reaching the same result that would be reached by cancellation. It appears to us, therefore, that the counter claim was allowable.

The appellee insists, however, that if such counter claim was allowable when filed the court did not err in dismissing it when the action was dismissed. The appellee's argument is that if the counter claim is allowed now it would be to his prejudice, and that he dismissed his action without prejudice, as he had a right to do.

It was doubtless his right to dismiss without being prejudiced by the dismissal. We think his right did not extend further. In the trial of the issues tendered by the counter claim he would lack no advantages which he would have enjoyed with his action pending.

In dismissing the counter claim we think that the court erred.

REVERSED.

REVERE FIRE INSURANCE COMPANY V. CHAMBERLIN ET AL.

1. **Practice: PLEADING: COUNTER CLAIM.** In an action in equity for the cancellation of a policy of insurance issued by the plaintiff, it was held that the defendant might by way of counter claim set up a cause of action on the policy for loss of the property insured, such cause of action being "connected with the subject of the action," within the meaning of section 2659 of the Code.
2. **Pleading: SUFFICIENCY OF ALLEGATION.** In a pleading claiming to recover on a policy of insurance, a statement of the amount of the policy and that such amount is due thereon is a sufficient averment of the amount of the loss, in the absence of objection thereto before trial.

Appeal from Des Moines District Court.

TUESDAY, JUNE 21.

ACTION to cancel a policy of insurance. The policy was issued to the defendant Chamberlin by the plaintiff's agent George A. Duncan, covering a stock of goods which was destroyed by fire. The plaintiff avers that the policy was wrongfully and fraudulently issued; that the loss had already occurred, as the defendant and Duncan well knew, and that the policy was not issued in pursuance of a previous agreement by parol.

The defendant concedes that the policy was issued after the loss, but denies that it was not issued in pursuance of a previous agreement by parol, and sets up such agreement. By way of counter claim he asks judgment for the amount of the policy. The court refused to cancel the policy, and rendered judgment for defendant for the amount of his proven loss. The plaintiff appeals.

Hedge & Blythe, for appellant.

J. & S. K. Tracy, for appellee.

ADAMS, CH. J.—That insurance may be effected by parol is well settled. See *The City of Davenport v. Peoria M. & F.*

Revere Fire Insurance Company v. Chamberlin.

Insurance Company, 17 Iowa, 276, and cases cited. That insurance may not be thus effected the appellant does not seriously contend, but it insists that according to the preponderance of the evidence no parol agreement for insurance was made.

It appears from the evidence that Chamberlin had been previously insured in the Commercial Insurance Company of St. Louis, which was represented by Duncan. This company became insolvent, and Duncan agreed with Chamberlin to take up the Commercial policy and give him a policy in some other company. Whether the plaintiff company was agreed upon as the company in which the new policy was to be issued, is the question in dispute. For the purpose of proving that that company was agreed upon, Chamberlin was examined as a witness in his own behalf. His testimony was in these words: "On Saturday, June 16, 1877, about ten A. M., I met George Duncan on Phillip's corner, who told me that the Commercial Insurance Company, in which I had a \$4,700 policy, was busted, and wanted to write me in another company. I asked him what good companies he had, and he gave me the names of some half a dozen, among them the Revere, of Boston. I asked him how the Revere stood. He replied, 'first rate,' and I said that Boston looked after her public institutions more closely than most cities; to put my risk in that company, and to make a memorandum of it so that I might know it was insured from twelve noon that day, saying, 'that is the understanding isn't it?' He said, 'yes, you are insured for \$4,700 in the Revere from noon to-day,' and took out his book and made a note of it." Afterward the book was introduced, showing the note or memorandum to be in these words: "June 16, 1877, put E. Chamberlin \$4,700 from Commercial in Revere Ins. Co. 1 year at $\frac{3}{4}$ from to-day." This memorandum Chamberlin testified showed substantially the agreement. Duncan being examined in Chamberlin's behalf, testified to substantially the same facts. If these witnesses are to be believed, the agreement for insurance in the

Revere Fire Insurance Company v. Chamberlin.

plaintiff company was clearly proved. But the plaintiff insists that they are not to be believed.

As impairing the credibility of Chamberlin, very little, if anything, is shown. But it is shown that Duncan, after his interview with Chamberlin, directed his clerk to make an entry of the insurance as taken in the German American Insurance Company, of Freeport. Such entry was made, and no change thereof was made until after the fire. It is also shown that while the fire was in progress Duncan stated that Chamberlin's insurance was in the German American Insurance Company. This evidence tended to show that whatever may have been said to Chamberlin, Duncan determined to issue to him a policy in that company instead of the Revere, and that the entry was made in pursuance of that determination, and not by mistake, as he claims. The clerk testifies that when he was directed to change the entry so as to show the insurance in the Revere, Duncan said that he was afraid that Mr. Chamberlin would kick, that Chamberlin had agreed upon the Revere, and that he could not explain it to him as he could have done if it had not been for the fire. But however little weight we might be disposed to give to Duncan's testimony in view of his proven statements and conduct, we are not able to say that Chamberlin's testimony is overcome. There is no direct evidence whatever that what occurred between him and Duncan was not substantially as he testified. If that is so, then the contract of insurance was complete, and it was not within the power of Duncan to annul it by any change of mind upon his part, or any entries which he might make. We conclude, then, the agreement relied upon was valid, and that the policy issued in pursuance of it must be sustained.

The plaintiff insists that, even if this is so, the court erred in rendering judgment for damages on defendant's counter

1. PRACTICE: claim. He insists that such a counter claim does
pleading :
counterclaim. not lie because the plaintiff's action is in equity,
and the defendant's cause of action, if he has any, is at law,

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and further, because the plaintiff does not claim a recovery of the defendant, and there can be no counter claim unless there is a claim. The determination of the question presented must depend upon the construction which should be given to the statute under which the counter claim was pleaded. Under section 2659 of the Code, sub. 2, a defendant may set up a counter claim when he has a cause of action "arising out of the contracts or transactions set forth in the petition, or connected with the subject of the action."

In the case at bar the transaction set forth in the petition was the wrongful and fraudulent issuance of the policy. Now, there may be some doubt whether the defendant can be said to have a cause of action arising out of the transaction set forth in the petition. But it is sufficient if he had a cause of action connected with the subject of the action as set forth in the petition. The subject of an action is to be distinguished from a cause of action. The subject of an action is the thing or subject-matter to which the litigation pertains. In Bliss on Code Pleading, Sec. 126, the author defines it as "the matter or thing differing both from the wrong and the relief, in respect to which the controversy has arisen." In the case at bar the subject of the action very clearly was the policy which had been issued, and just as clearly the defendant's cause of action was connected with it, being based upon the loss against which the policy purported to provide indemnity.

In Indiana the statute in regard to counter claims is scarcely as broad as ours, yet a counter claim was upheld in a case substantially like the case at bar. *Woodruff v. Garner*, 27 Ind., 4. That was an action in equity brought to cancel a deed as having been obtained by fraud. The defendant denied the fraud, and asked by way of counter claim for judgment for possession. It was held that the right to set up such counter claim could be sustained upon the ground that the deed constituted a link connecting the two causes of action. In our opinion, then, the defendant in the case at

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bar had a right to set up his claim upon the policy by way of counter claim.

But the plaintiff contends that the counter claim as pleaded is insufficient. The objection urged to it is that it does not state the amount of the defendant's loss. The ^{sufficiency of} ^{allegation.} fact of the issuance of the policy is averred, the amount of the policy, and the destruction of the goods. Then follows an averment that the amount stated in the policy, with six per cent interest, is due to the defendant from the plaintiff. Upon these averments the parties went to trial. The evidence showed that the amount of the defendant's loss was adjusted and agreed upon. The judgment rendered is based upon that evidence. We do not think it can be reversed for insufficiency of the defendant's pleading.

AFFIRMED.

SUPPLEMENTAL OPINION.

The plaintiff in a petition for a rehearing claims that the judgment in any event is too large. In our opinion we assumed that the judgment was based upon the adjustment agreed upon by the plaintiff's adjuster, in connection with the adjusters of other companies which had issued policies upon the same property. Upon a re-examination of the case we discover that the amount thus agreed upon is not equal to the amount of the several policies. But it is not necessary to conclude that the judgment was based upon such adjustment. There was competent, and we think sufficient, evidence, aside from such adjustment, that the defendant's loss was greater than the amount of the several policies. It is true it appears that the defendant agreed to the adjustment, but then it also appears that he did so only upon the understanding that all the policies, including the one in suit, were to be settled. As the plaintiff afterward refused to settle, we think that the defendant was not bound by his agreement.

Other points are made in the petition for a rehearing which we have carefully examined, and we have to say that we think that the petition must be overruled.

FLANNIGAN V. ALTHOUSE, WHEELER & CO. ET AL.

1. **Evidence: VALUE OF PROPERTY SOLD ON EXECUTION: APPRAISEMENT.** The appraisal of property sold under execution is not competent evidence to prove its value, in an action by one claiming to be the owner of the property to recover its value.
2. ———: **OFFICER'S RETURN ON EXECUTION.** The return of an officer on an execution constitutes the best evidence of what property was levied on thereunder.
3. **Instruction: MORTGAGE: FRAUD.** An instruction relating to the fraudulent transfer and mortgage of personalty considered and held erroneous under the evidence.

Appeal from Howard Circuit Court.

MONDAY, JUNE 21.

THE plaintiff is the holder of a chattel mortgage executed upon certain personal property by one John Murray. The defendants Althouse, Wheeler & Co. are judgment creditors of one Davis & Thomas. As such they caused an execution to be issued and levied upon the mortgaged property, claiming that the same was the property of their judgment debtors Davis & Thomas, and that if they ever sold it to Murray, the plaintiff's mortgagor, the sale was fraudulent and void.

The plaintiff served upon the officer who levied the execution notice of his claim, and thereupon the defendants executed and delivered to him an indemnifying bond, and he proceeded and sold the property. This action is brought to recover the damages which the plaintiff alleges that he sustained by the sale. There was a trial by jury and a verdict and judgment were rendered for the plaintiff. The defendants appeal.

H. T. Reed and C. M. Brooks, for appellants.

H. C. McCartney, for appellee.

ADAMS, CH. J.—I. To prove the value of the property sold the plaintiff offered in evidence the appraisal attached to the sheriff's execution. The defendants objected to the appraisal as incompetent and immaterial, but the court overruled the objection, and the appraisal was read in evidence.

In our opinion it was not proper to prove the value of the property in this way. The appraisal, it is true, is provided for by law, but not for such a purpose. We think that the value should have been proven by witnesses introduced upon the stand who should first show themselves competent to testify upon such a subject, and even then it would have been the right of the defendants to test their judgment by a proper cross-examination.

It is claimed by the plaintiff that there was other competent and undisputed evidence showing that the value of the property was not less than the amount of the verdict, but we fail to discover such evidence.

II. The appraisal introduced in evidence included certain sheep valued at \$45. The return upon the execution did not show that any sheep were levied upon or sold. To prove, however, that the officer took sheep from Murray's farm, he was examined upon the stand and was asked, "How many sheep did you take from his farm?" The defendants objected to the testimony as not the best evidence. The court overruled the objection, and the witness answered, "I think there were thirty. Four were afterwards left at Searle's. I don't know whether they were ever returned to Murray or not."

The defendants were liable for only such property as was seized by the officer by virtue of his execution. Now section 3043 of the Code provides that where an execution is levied "an exact description of the property at length, with the date of the levy, shall be indorsed upon or appended to the execution." This indorsement, constituting the officer's return, be-

Flannigan v. Althouse, Wheeler & Co.

comes the evidence as to what property is covered by the levy. Herman on Executions, section 236; *Le Barron v. Taylor*, 53 Iowa, 637. The defendants' objection to the officer's testimony we think was well taken, and should have been sustained.

III. The court gave an instruction in these words: "It is incumbent upon the plaintiff to show by a preponderance of evidence that John Murray owned the property
3. INSTRUCTION: mortgage: fraud. mortgaged, and that the mortgage was executed by John Murray to him, and it is incumbent upon the defendants to establish the fraudulent combination to defraud creditors. If fraud is established between Davis & Thomas and Murray, then the plaintiff must show that he took the mortgage without notice of the fraud." The defendants claim that the last part of the instruction is erroneous, because it carries a plain implication that if the plaintiff took his mortgage without notice of the fraud he would hold the property as against the creditors of Davis & Thomas, even though the property belonged to them and had been fraudulently transferred to Murray.

The defendants averred in their answer that the mortgage was without consideration, and the evidence tended strongly to show that the consideration was not such as would constitute the plaintiff a bona fide purchaser for value in such sense as to give him a superior equity as against the defendants. If he took the mortgage to secure an antecedent debt and gave no extension, as the jury, we think, might have found, then it was sufficient for defendants to merely establish the fraud. *Ryan v. Chew*, 13 Iowa, 589. As the instruction tended to preclude the jury from this consideration it appears to us that it cannot be approved.

REVERSED.

FAYETTE COUNTY V. BREMER COUNTY.

1. **Residence: CHANGE OF: INSANE PAUPER.** An insane and helpless pauper, who was removed from the county of her residence to another county that she might be continued in charge of the persons who had previously cared for her, and who was supported by the former county for a year after her removal, it was held did not acquire a settlement in the county to which she was taken, nor lose her residence in the former county.

Appeal from Floyd Circuit Court.

TUESDAY, JUNE 21.

PLAINTIFF brought this action to recover for money expended in the support of a pauper alleged to have a settlement in Bremer county. The case was tried to the court without a jury and a judgment was rendered for defendant. Plaintiff appeals. The facts of the case appear in the opinion.

Ainsworth & Hobson, for appellant.

Gibson & Dawson, for appellee.

BECK, J.—I. The petition alleges that one Lucy Mix, a resident of Bremer county, was a pauper and provided for as such; that the township trustees with the knowledge of the board of supervisors caused her to be removed to Fayette county, where she was supported for more than a year by Bremer county, all of which was fraudulently concealed from plaintiff; that the defendant was notified that application for her support had been made to plaintiff, and the pauper was warned by plaintiff as provided by law to depart from Fayette county, and that in order to prevent her from suffering the plaintiff had provided for her support, the cost whereof this action is prosecuted to recover. The answer admits that Lucy Mix had been supported as a pauper for four or five years before she was taken to Fayette

Fayette County v. Bremer County.

county and for more than a year afterwards. Other allegations of the petition are denied.

The Circuit Court found the following facts, viz: "Lucy Mix is a pauper, and for four or five years prior to the year 1876 was a resident of Bremer county, and a charge upon that county. She lived with James Eastman and wife, her brother-in-law and sister, and had lived with them about eight to ten years. About the first of March, A. D. 1876, James Eastman rented a farm in Banks township, Fayette county, and was about to remove on this farm from the farm occupied by him in Sumner township, Bremer county, but before doing so he called upon some of the trustees of Sumner township, Bremer county, in regard to the support of Lucy by Bremer county, in case he should take her with him to Fayette county, and was informed by the trustees of Sumner township, in substance, that as Bremer county had no poor farm, they knew of no reason why Bremer county would not be willing to support Lucy in Fayette county, and advised him to take Lucy along until it was ascertained what Bremer county would do in the matter.

"James Eastman thereupon took Lucy along with him into Banks township, Fayette county, and Lucy was supported for a little over a year by Bremer county, while she lived in Banks township.

"Neither the board of supervisors nor the trustees of Banks township, Fayette county, knew of the removal of Lucy from Bremer to Fayette county until after she had lived in Fayette county one year. After Lucy had lived in Fayette county one year, Bremer county refused to furnish her support, and thereupon application was made in her behalf to the trustees of Banks township, Fayette county, for support, and Fayette county furnished support for Lucy, as charged in the petition.

"Lucy was a cripple and pauper, and has been insane for the past four or five years, and required support. She had no relatives other than James Eastman and wife in this State,

Fayette County v. Bremer County.

and their pecuniary circumstances did not enable them to support her at their expense.

"The support furnished by plaintiff to Lucy was reasonable, necessary, and proper. On the eighteenth day of April, 1877, the plaintiff, by its county auditor, notified the defendant in writing, by postal card, that Lucy Mix, an invalid pauper of Bremer county, had applied for relief in Fayette county, and that Bremer county would be held responsible for her care and support. In answer to this notice defendant notified plaintiff by letter dated April, 1877, that Lucy Mix was not a resident of Bremer county, but was a resident of Fayette county, and that Bremer county was not liable for her support.

"The allegations of fraud in the petition are not sustained by the evidence. The defendant did not procure the removal of Lucy to Fayette county."

II. Upon these facts the court below reached the conclusion that the pauper gained a settlement in Fayette county, which thereby became liable for her support.

The court below found in addition to the facts set out above that the pauper "resided in Fayette county for more than a year without notice to defendant."

We are required to determine whether the "residence" of the pauper, under the circumstances set out in the court's findings, gained for her a settlement in Fayette county.

It is not denied that the pauper had a settlement in Bremer county. "A settlement once acquired continues until it is lost by acquiring a new one." Code, § 1353. The testimony clearly shows that the pauper did not, of her own will, seek a residence in Fayette county, and that she was incapable of entertaining an intention to acquire a settlement there.

The court finds that at the time she was removed to Fayette county she was a "cripple" and insane. The evidence further shows and the court may well have found that she was helpless from a time long before her removal, and

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that she continued helpless and insane during her residence in Fayette county.

III. Can an insane pauper gain a settlement by being removed to another county and there supported by the county wherein she has a settlement?

1. We conclude that, on account of her insanity and helplessness, the pauper did not voluntarily change her place of residence. She was a passive subject and exercised no volition. In this condition she was incapable of acquiring a settlement. The following authorities sustain this conclusion: *Washington Co. v. Mahaska Co.*, 47 Iowa, 57; *Town of Freeport v. Board of Supervisors*, 41 Ill., 495; *Danville v. Putney*, 6 Vt., 512; *Woodstock v. Hartland*, 21 Vt., 563.

2. The pauper was taken from Bremer county to Fayette not with the purpose of changing her settlement, but that the first named county might continue her in the charge of the same persons who had for years kept her. She was indeed sent to Fayette county for her support to be paid for by Bremer county. Her condition, as to settlement, remained just as it would be in the case she had been sent to a hospital. Surely an insane pauper cannot acquire a settlement in the county wherein the hospital is located to which he may be sent. We have so held in *Washington Co. v. Mahaska Co.*, 47 Iowa, 57.

The rule recognized by the court below, if sanctioned by us, would lead to abuses and injustice. Under it insane and helpless paupers could be secretly transported by counties charged with their support and other counties would become liable therefor.

The judgment of the Circuit Court is reversed, and the cause is remanded for a judgment in harmony with this opinion.

REVERSED.

WELLS v. THE B. C. R. & N. R. Co.

56	520
88	627
88	636

56	520
88	413

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91	569

56	520
102	510

108	197
103	671

56	520
106	88

1. **Practice: BILL OF EXCEPTIONS: SKELETON BILL.** A skeleton bill of exceptions must identify the papers to be inserted by the clerk so as to leave nothing to his discretion.
2. **Practice in the Supreme Court: ABSTRACT.** Where an appellee files an additional abstract setting out evidence not contained in that of the appellant he cannot deny that all the evidence is preserved in the court below and presented to the Supreme Court in the abstracts.
3. **Railroads: NEGLIGENCE: WAIVER BY EMPLOYE.** Where it was shown that a brakeman, who was knocked from the top of a freight car by a bridge, had been employed on the same portion of the road for several years, and knew the height of the bridges but remained in the service without protest, it was held that he thereby waived the negligence of the company in that regard.

Appeal from Butler Circuit Court.

TUESDAY, JUNE 21.

THE plaintiff is the administratrix of the estate of her deceased husband, Victor J. Wells, and prosecutes this action to recover the damages sustained by reason of the death of the intestate caused by the negligence of defendant while he was in its employment as a brakeman. There was a verdict and judgment for plaintiff; defendant appeals.

J. & S. K. Tracy, for appellant.

Fred Gilman and *D. F. Gibson*, for appellee.

BECK, J.—I. At the term of this court held in October, 1880, at Dubuque, a motion made by plaintiff to strike from the record the bill of exceptions was sustained. On the day this order was made defendant moved the court to set it aside. The cause, with this motion and a motion of plaintiff to affirm the judgment, was continued to the December term and defendant had leave in open court to file an amended abstract. At the December term plaintiff moved to strike defendant's

amended abstract, filed November 13, 1880, in pursuance of leave obtained as aforesaid. The cause was thereupon continued until the March term, 1881, at Council Bluffs, with an order that all motions be submitted with the case. At the March term the cause, with the motions, was finally submitted for decision. The motions first demand our attention.

The motion to strike the bill of exceptions is based upon the ground that it is a "skeleton bill" and does not sufficiently identify the evidence and instructions, which it was intended to present as parts of the record. Under the rule of *Hill et al. v. Holloway*, 52 Iowa, 676, the bill of exceptions is not sufficient, as it fails to identify, in any manner, the evidence and instructions, the only proceedings referred to therein. If this bill of exceptions were to be depended upon alone to make the evidence and instructions a part of the record, we could not determine whether they were truly set out in the record. It merely directs the clerk to copy as a part thereof the evidence, and the instructions given and refused, leaving for the clerk to determine what he shall copy and giving no means of identification whereby he may be directed what papers he shall copy, and whereby errors, if he should make any, could be corrected. The true practice in preparing bills of exceptions is very simple and leaves the clerk no opportunity for mistakes in preparing the transcript. The bill should identify the different papers intended to be made a part of the record in something like the following manner: "Here clerk will copy evidence certified by the court, filed in this case and marked A." "Here clerk will copy instructions given upon request of the plaintiff, filed in this case and marked B." etc., etc. A proper manner of identifying with certainty papers intended to be referred to in bills of exceptions will readily occur to the practitioner.

We think the order sustaining plaintiff's motion to strike

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the bill of exceptions was rightly made, and the motion to set it aside ought to be overruled.

II. We are now required to consider plaintiff's motion to strike the amended abstract filed by defendant. This abstract is probably intended to set out more fully some parts of the testimony, and is especially designed to present the instructions given and refused, with the exceptions noted upon the margins thereof. It is not unusual to allow parties to file amended abstracts when they discover that their cases were not fully presented in the original abstracts. This, of course, is always done before the case is submitted, and at such times as the other parties will not be prejudiced thereby. The amended abstract of defendant was filed in ample time, before the submission of the case, for the plaintiff to present corrections, or deny its statements. The motion to strike it is overruled.

III. Plaintiff moved to affirm the judgment of the court below upon the ground that after the bill of exceptions has been stricken out nothing remains to show the evidence in the case, or the errors in and exceptions to the rulings of the court below. We will proceed to consider the questions arising under this motion.

September 1, 1880, before the first term at which the case appeared in this court, plaintiff filed with the clerk an additional abstract correcting and making additions to the evidence presented in defendant's original abstract. It is not claimed by plaintiff that the original abstract and plaintiff's additional abstract do not present all the evidence in the case. Indeed the inference is to be drawn from the act of plaintiff in correcting and adding to the evidence, as set out in the original abstract, that she admits that all the evidence is presented by the two abstracts. We have held that a party filing an additional abstract purporting to supply defects and omissions in the original abstracts cannot deny that all the evidence is before the court. *Starr v. The City of Burlington*

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ton, 45 Iowa, 87; *Cross v. The B. & S. W. R. Co.*, 51 Iowa, 683.

Plaintiff by her additional abstract admits that the evidence was preserved in the court below, and presents additions to the testimony which she inferentially admits sets out, with the original abstract, all the testimony in the case. We will not permit her to deny, after making the admission, that the evidence is preserved in the court below, and that the parties by their several abstracts present all of it to this court. Parties to actions will not be permitted in this manner to change the grounds upon which they claim the judgment of the court and deny what they have before admitted.

The striking of the bill of exceptions does not take from the records the instructions and the exceptions thereto, for they are made a part of the record without a bill of exceptions. Code, § 2787. In the case before us the giving and refusing of the instructions and the exceptions are noted upon the margins. This is sufficient, without a bill of exceptions, to authorize this court to review the rulings of the Circuit Court upon the instructions; *Cadwallader & Company v. Blair et al.*, 18 Iowa, 420; *Phillips v. Starr & Co.*, 26 Iowa, 349.

We conclude plaintiff cannot deny that the evidence set out in the abstract is all the testimony in the case, and that the instructions, and exceptions thereto, sufficiently appear in the record without the bill of exceptions, all of which is properly presented by the abstract. The plaintiff's motion to affirm must, therefore, be overruled and the cause must be considered upon its merits.

Under a rule of this court arguments filed with the clerk after a cause is submitted are not sent to the justices. The plaintiff's counsel did not file his argument until after the submission of the cause. In view of the fact that counsel may have been misled as to the time when the cause was set down for hearing, and of other circumstances, we think the rule ought not to be applied in this case. We have therefore

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required the clerk to supply us with all the arguments in the case and we have given to all due consideration.

V. The evidence tends to show that the plaintiff's intestate, who, at the time, was a brakeman in defendant's employment, was killed by being knocked from the top of a freight car, where he was in the discharge of his duty, by the timbers of a bridge over which his train was passing. It is shown that the bridge timbers were a little over five feet above the top of the car, while deceased was a man of more than six feet in height. The train was running about eight miles per hour at the time of the accident. The intestate had been employed as a brakeman for more than four years upon that part of the defendant's road whereon was the bridge at which the accident occurred, and other bridges of like construction and height, and, of course, had often passed over them.

The defendant asked the court to instruct the jury to the effect that if they found the service of the intestate as brakeman upon the route where he was employed was hazardous and dangerous on account of the bridge being of insufficient height, of which he had knowledge while employed upon this part of the road, and he continued in defendant's service without objection, the law, in such case, is that he assumed the dangers incident to the service resulting from the bridge in question, and his administratrix, therefore, cannot recover on account of his death. The court refused to give this instruction. It should have been given. The rule of the instruction is announced in *Perigo v. The C. R. I. & P. R. Co.*, 52 Iowa, 276; *Muldowney v. The Ill. Cent. R. Co.*, 39 Id., 615; *Kroy v. The C. R. I. & P. R. Co.*, 32 Id., 357; *Way v. The Ill. Cent. R. Co.*, 40 Id., 341; *Lumley v. Caswell*, 47 Id., 159.

The principles upon which the rule is based are well stated by DAY, J., in *Perigo v. The C. R. I. & P. R. Co.* Referring to the other cases above cited he uses this language: "The doctrine of these cases is that the negligence of the

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negligence:
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employee.

defendant in furnishing defective or improperly constructed machinery and implements is waived by remaining in the employment without protest or promise of amendment. The waiver of the negligence of the defendant places the case in the same position as though the defendant had not been negligent; and without the negligence of the defendant there can be no recovery. This waiver cannot be affected by the particular situation in which the employe may be placed, or the rapidity and promptness with which he may be required to act at the time of the accident. These questions may very properly bear upon the question of the contributory negligence of the employe, but they can have no bearing upon the question whether the defendant has been guilty of negligence about which the employe has a legal right to complain." This point of the case demands no further consideration.

III. Counsel for plaintiff insist that the burden rested upon defendant to show knowledge of the deceased as to the dangerous character of the bridge, and that he had remained in defendant's employment without objection or protest, and that no evidence was offered upon this point. The position is based upon the ground that the waiver of liability of defendant, resulting from the deceased remaining in the service of defendant without objection, being a defense, the burden of proof to support it rests upon defendant. We think this position as to the law is correct so far as it applies to the affirmative allegation of the defense to the effect that deceased had knowledge of the danger of the service. It is possible, but the point we do not decide, that the burden then changed to plaintiff, requiring her to show, in order to defeat the waiver of defendant's liability, that deceased did make objection to the service on account of the danger, or that defendant had promised to remove the cause thereof. But we are of the opinion that there was evidence tending to show the knowledge of deceased as to the dangerous condition of the bridge, and that he made no objection on account of the hazard resulting therefrom. It is shown that he had been

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employed for more than four years as brakeman on the part of the road whereon the dangerous bridges were situated, and that in speaking of another brakeman that was knocked down by one of the bridges he expressed the opinion that the brakeman "might have known that he would not have cleared" [the bridge]. It is also shown by another brakeman, who was often with him while passing these bridges, that "he would have to stoop over to clear his head." It is not shown that he made any objection or complaint on account of the dangerous character of the bridges. This evidence tends to show that he did have knowledge of the dangers resulting from the insufficient height of the bridges. And, surely, the inference may be drawn from this testimony that he made no objection to the service, based upon these dangers. There is reason for the conclusion that deceased would not have remained for four years in the hazardous service had he expressed objection thereto. These facts are proper to be considered and weighed in determining the issue involving the waiver by the intestate of defendant's liability arising from the dangers of the bridges. It is of course understood that the knowledge of the intestate and his failure to make objections may be shown by circumstances, and inferred from his conduct. Direct proof upon these points is not required. The knowledge of the dangerous character of the bridge may be inferred from opportunities of obtaining such knowledge in the exercise of ordinary care. *Muldowney v. The Ill. Cent. R. Co.*, 39 Iowa, 615. There was evidence tending to show that intestate possessed such opportunities.

We conclude that there was evidence tending to establish the facts which would constitute a waiver of defendant's liability under the instruction refused by the court. It ought, therefore, to have been given. For the error in refusing it, the judgment of the Circuit Court is

REVERSED.

RENWICK V. BANCROFT ET AL.

1. **Principal and Agent:** AUTHORITY TO APPOINT SUB-AGENT. Where an agent was authorized by the owners to sell certain land, exercising his own discretion as to price and terms after an examination of the land, it was held that he might properly employ a sub-agent to find a purchaser, and that a sale made by such sub-agent was binding upon the owners.

56	537
100	302
56	537
106	234
56	537
136	707
56	537
140	18

Appeal from Howard Circuit Court.

TUESDAY, JUNE 21.

THIS is an action in equity, for the specific performance of an alleged verbal contract for the purchase of eighty acres of land; there was a trial upon written evidence, and a decree for the plaintiff. Defendants appeal.

Foreman & Marsh, for appellants.

Barker Brothers and *H. T. Reed*, for appellee.

ROTHROCK, J.—The land in controversy was the property of the children and heirs of John H. Cutler, deceased. It was wild and uncultivated prairie situated in Howard county in this State. The owners, being some five or six in number, were non-residents of the State. One of them, Lucy F. Whitney, with her husband, W. B. Whitney, resided in Chicago, Illinois. Some of the others, and possibly all of them, resided in the State of New Hampshire. The plaintiff claims that he made the purchase of the land through J. Barker, a real estate agent at Cresco, Iowa, for \$1050, and that in pursuance of his purchase he paid the said Barker \$100 in cash and made arrangements with him for \$150 more to be on deposit until the conveyance should be received from the owners.

The defendants deny the authority of Barker to make the sale, and repudiate the alleged contract made by him with the

Benwick v. Bancroft.

plaintiff; and here is the ultimate question upon which the case must turn, and which we are required to determine from the evidence, the appeal being here for trial anew.

Before proceeding to an examination of the merits of the case, it is proper that we should say that the action was in the first instance commenced against George Bancroft and Joseph H. Smith, executors of the will of J. H. Cutler, deceased. These parties answered disclaiming any interest in the land, and thereupon the plaintiff amended his petition making the heirs or devisees of said Cutler parties defendant. We are unable to perceive that the making of the executors parties affects any substantial right of either party, or that it should have any bearing in determining the rights of the parties in interest. If the real parties defendant, who are conceded to be the heirs of Cutler, are not bound by the contract made by the plaintiff with Barker, that is an end of the controversy, and there must be a decree dismissing the plaintiff's petition.

We will proceed to examine the rights of the parties with reference to the alleged contract. As has been stated one of said heirs, the wife of W. B. Whitney, resided in Chicago, Illinois. The evidence shows that said W. B. Whitney called upon said Barker at his office in Cresco about the 22 of May, 1878, and stated to Barker that at the request of the administrators and heirs of the Cutler estate he came out to look over the land, with authority to sell or dispose of it in any way that in his judgment might seem best. He stated that he had been to see the land, and that he considered it worth \$12.50 per acre, and asked Barker if he could sell it for that. Barker replied that he could. Whitney thereupon authorized Barker to sell the land at that price; said he would want at least \$100 in cash, and that if Barker could get \$150 or \$200 in cash to do so; that they wanted to sell to a good party and enough cash to secure the sale, and that the purchaser could have all the time he wanted on deferred payments up to ten years by paying ten per cent on the deferred payments

and improving the land; that if any man would deposit \$100 with Barker on a purchase he could at once take possession and go to breaking, and the money could remain in Barker's hands until the necessary deeds and papers were forwarded. As to the commission to Barker, Whitney said he (Barker) could add \$50 to price of land; that the owners could not pay any commission out of the price they were asking for the land. These facts were testified to by said Barker and by W. B. Barker, and they were not contradicted by any witness. Whitney was not examined as a witness in the case.

The evidence further shows that on the forenoon of the 27th of May 1878, Barker made a verbal contract with the plaintiff for the sale of the land for \$1050. Plaintiff paid to Barker \$100 in cash and made arrangements with Barker to advance for him \$150 more if the deed should be received from defendants before he could raise that amount, and plaintiff was to pay \$100 November 1879, and \$200 a year thereafter until all was paid, with interest at ten per cent. Plaintiff took possession under this contract and broke from fourteen to sixteen acres of prairie.

These facts being established by the evidence beyond all question, it follows that if Whitney was authorized by the owners of the land to make a sale, using his judgment as to value and terms of payment, and if he was further authorized to make the sale through Barker, the defendants are bound thereby. The contract was not within the statute of frauds if the payment of the \$100 was authorized, because there was not only payment of part of the purchase money, but possession of the land was taken by the purchaser.

II. We will next inquire as to the authority of Whitney to make the sale. Of course the declaration of Whitney to the effect that he was authorized to make the sale amounts to nothing. The authority of an agent cannot be shown by the declarations of the agent. But the plaintiff took the testi-

 Renwick v. Bancroft.

mony of two of the defendants and heirs. One of them, Sallie A. Terry, testified that she had an arrangement with Whitney to sell her interest in the land; that it was not in writing but made verbally with Wm. P. Cutler; that she instructed Cutler to write Whitney for this purpose, and that her impression was that Whitney was not required to submit propositions or agreements to her for her approval before sale could be completed. This witness also stated that she had never employed Barker to make a sale and that Whitney never advised her that he had employed Barker. Wm. P. Cutler testified that he never employed Barker nor authorized Whitney to employ him to sell the land. The witness further testified as follows:

"I appointed him to do it personally, but not to appoint an agent. I employed Whitney to make a sale of my interest. He was requested and authorized by me and the other heirs, as he was nearest to the land, to go down and look at it and see what he could sell it for, and to make a sale if he thought best. It was left to his judgment to sell or not to sell. We requested him to use his own judgment in the matter; if he found the price satisfactory to go on and sell it. He had authority to sell the land without submitting contract for sale to me. I have executed deed of my interest in the land since May 27, 1878, to a Mr. Cray. The same was done without any knowledge or information of any contract between plaintiff and Jeremiah Barker for sale and purchase of it."

Here, then, we have the evidence that the owners authorized Whitney to make the sale if he thought best to do so. He was to use his own judgment in the matter. There is no evidence in the case contradictory to that last above cited. The other defendants were not examined as witnesses. Counsel do not in argument question Whitney's authority to sell the land on credit, as to part of the purchase money. We presume it is conceded that the usage of trade would authorize an agent to extend

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credit although not specifically empowered to do so. Parsons on Contracts, Vol. 1, p. 58.

It is insisted that if it be conceded Whitney had authority to make the sale he had no authority to delegate his agency to Barker. That this is a general rule must be conceded. But the evidence in this case does not show that Whitney invested Barker with any discretion as to the price at which the land should be sold. Whitney examined the land and put a price upon it upon his own judgment, and the sale made by Barker was in substantial compliance with the terms fixed by Whitney. Whitney was not precluded by his agency from employing whom he thought proper to aid him in finding a purchaser. Barker was but the instrument through whom Whitney carried out his agency. The defendants are not required to trust the honesty of Barker in paying over the cash payment in his hands. It is not sought by the plaintiff to compel a conveyance without the payment of the money to the defendants. It is said that Barker was to sell to a "good man," and that there is no evidence that the plaintiff is entitled to that appellation. In the absence of evidence upon that question it should be presumed that the plaintiff is solvent and responsible for his contracts.

III. It appears that after the sale by Barker to the plaintiff one Stradley, who was also authorized by Whitney to find a purchaser for the land, made a sale to one Cray for \$1200 and the defendants have made a conveyance to Cray. By an amendment to the petition Cray was made a party defendant, and it was charged that he purchased with notice of the prior purchase of the plaintiff. This Cray denies. A careful examination of the evidence satisfies us that Cray purchased with full knowledge of the plaintiff's contract. We need not set out the evidence upon this question. A mere statement of it would demonstrate the correctness of our conclusion. We have not entered into a discussion in answer to all the arguments of counsel. The foregoing views, we think, dispose of every material question in the case. This contro-

Mason v. Searles.

versy may be justly termed a scramble between the plaintiff and Cray to obtain the land in controversy. There is nothing in the case warranting the belief that the defendants would have questioned the contract made by the plaintiff if it had not been that they were offered \$150 more by Cray.

IV. The decree provides "that plaintiff shall have a conveyance of the land upon his executing his promissory notes properly secured to the defendants for the balance of the amount agreed upon between plaintiff and defendants on May 27, 1878, to-wit, \$800 as follows: \$100 in one year from date of conveyance to plaintiff; \$200 in two years; \$200 in three years and \$300 in four years after date of conveyance, with annual interest at the rate of ten per cent per annum; time being computed from date of conveyance." This decree should be modified as follows. The plaintiff should be required to pay the \$200 cash payment before conveyance and the deferred payments should be secured by mortgage on the land. And as the defendants obtain by this modification a more favorable decree than that appealed from, appellee will be taxed with the costs of the appeal.

MODIFIED AND AFFIRMED.

MASON V. SEARLES ET AL.

53 532
86 536

1. **Pleading: ALLEGATION OF FRAUD: INSUFFICIENCY OF.** A pleading which simply avers fraud as a legal conclusion, without stating the facts constituting it, is insufficient and may properly be stricken out on motion.
2. **Usury: WHERE NO DEFENSE: MONEY BORROWED TO PAY USURIOUS DEBT.** One who borrows money at a legal rate of interest to pay an usurious debt cannot maintain a plea of usury against the new creditor by showing that he knew the debt paid with the borrowed money was usurious.
3. **Practice: ATTORNEY'S FEE: WHEN TAXABLE AS COSTS.** When an attorney's fee is authorized to be taxed as costs it may be fixed by the

Mason v. Searles.

court without a jury, but after an appeal is taken in the action it cannot properly be fixed until such appeal is determined.

Appeal from Black Hawk Circuit Court.

TUESDAY, JUNE 21.

ACTION upon two promissory notes executed to plaintiff by defendants. For answer the defendants plead usury. There was a trial by jury and verdict and judgment were rendered for the plaintiff for the full amount claimed. From such judgment the defendants appeal.

After the appeal was taken the plaintiff filed a motion to retax costs so as to include an attorney's fee, it having been stipulated in the notes that an attorney's fee might be taxed with the costs. The court overruled the motion and from such order the plaintiff appeals.

Boies & Couch, for appellant.

O. C. Miller, for appellees.

ADAMS, CH. J.—I. The court upon motion struck out a part of the defendants' answer, and the first question presented by the defendants is as to the correctness of the action of the court in so doing.

Before proceeding to the consideration of the question it is necessary that we should state that prior to the execution of the notes in question the defendant S. F. Searles had borrowed a large sum of money of one Vorce at a usurious rate of interest. At the time the notes in suit were given there remained due to Vorce the amount of these notes, to-wit, the sum of \$700. One George Mason was acting for Vorce in attempting to collect the notes due him. Searles represented that he was without the means to pay. Thereupon, at the suggestion of George Mason, Searles, with his brother as surety, who is made defendant herein, executed to plaintiff the notes in suit

1. PLEADING:
allegation of
fraud: insuffi-
ciency of.

Mason v. Searles.

and George Mason, who was acting as agent for plaintiff in loaning money and had then money in his hands to loan for plaintiff, advanced the sum of \$700 from the plaintiff's money and paid off Vorce and delivered the new notes to plaintiff. The defendants claim that they did not understand that they were making a new loan, but simply procuring an extension of the old one, and that if the transaction is to be considered as the making of a new loan they were led into it by the fraud of George Mason. They accordingly averred in their answer in substance that they had no knowledge that George Mason was acting for the plaintiff; that he represented that he was acting for Vorce and fraudulently concealed from the defendants that he was taking the notes in the name of the plaintiff, and fraudulently led them to believe that he was taking the notes in his own name as the agent of Vorce and for his benefit; that they never had any business with the plaintiff and never gave the notes as evidence of a loan of money from him.

So much of the answer as contains the foregoing averments in substance was stricken out and the ruling thereon is assigned as error.

It was competent, of course, for the defendants to show if they could that in the execution of the new notes they did not in fact make a new loan from plaintiff, but procured an extension of the old one from Vorce. But this averment in substance was left in their answer after the motion to strike out was sustained, and upon the issue tendered by this averment the case was tried. They claim, however, that they were entitled to go farther and maintain their defense of usury even if they did make a new loan from the plaintiff, provided they were fraudulently induced to believe that they were not doing so, but merely procuring an extension from Vorce.

They further claim that as George Mason was the plaintiff's agent in taking the notes his fraud should be deemed the plaintiff's fraud.

The doctrine of the responsibility of the principal for the agent's fraud we do not care to discuss. If we should concede that George Mason's acts were the plaintiff's acts we should not be prepared to say that the right to plead usury is such a right that a person can be said to be defrauded of it by a third person who has no interest in it. But we do not need even to go into that question. The averment of fraud in this case it appears to us is nothing more than the averment of a conclusion. No specific word or act of George Mason is averred which appears to be fraudulent. It is averred, to be sure, that he concealed from the defendants that he was taking the notes in the name of the plaintiff. But the plaintiff's name was written in the notes, and there is no averment that there was any attempt to conceal the name thus written. They further aver that George Mason led them to believe that he was taking the notes in his own name, but they do not aver that he represented that the name written in the notes was his name. Possibly he did lead them so to believe, but if so it may be that he had no such design, and that they had no good reason for believing it. The fraud then, so far as the answer shows, is merely the defendants' conclusion. In sustaining the motion to strike out we think there was no error.

II. The plaintiff was allowed to testify against the objection of the defendants that he had no knowledge of the Vorce transaction. They say that he should not have been allowed to so testify because it had already been proven that he had such knowledge by reason of the fact that his agent George Mason had it, and that by allowing plaintiff to testify to a want of personal knowledge the court might have led the jury to infer that a want of personal knowledge was sufficient to enable him to evade the plea of usury.

In our opinion the testimony was immaterial, but for a reason which absolutely precluded it from being prejudicial.

2. USURY :
when no de-
fense : money
borrowed to
pay usurious
debt.

Mason v. Searles.

Where one person borrows money of another at a legal rate of interest to pay a usurious debt he cannot maintain a plea of usury against the new creditor by showing that he knew that the debt paid off with the borrowed money was usurious. If, then, the plaintiff had testified not only that he had knowledge of the Vorce debt but knew it to be usurious, and that his money was borrowed to pay it, his case would not have been different.

It is true that the evidence shows that some blood relationship existed between plaintiff and Vorce, and it is insisted that where money is borrowed of one relative to pay another, as in this case, a different rule may be applicable, but this cannot be admitted.

Near relationship may sometimes be shown as a circumstance in determining a question of fraud, but, as we hold, there was no question of fraud in this case.

III. The court gave an instruction in these words: "The mere fact that George Mason was agent for said Vorce and that the said loan from Vorce was usurious and that said usurious loan was discharged by a loan made by said George Mason for the plaintiff, John Mason, Jr., does not make the latter loan liable to the defense of usury."

The defendants claim that this instruction is in conflict with *Garth v. Cooper & Smith*, 12 Iowa, 365. In that case the court said: "The substitution of one contract for another—the taking of a new note for the old one—will not purge it." But the instruction given supposes a new loan, and that too from a different party from the original creditor. If there was such loan there was no substitution.

IV. The defendants claim that the verdict is contrary to the evidence, but it seems to us otherwise.

Several errors are assigned which we have not specifically discussed. They are covered substantially, we think, by the views which we have expressed.

V. Coming to the question of the plaintiff's appeal, we

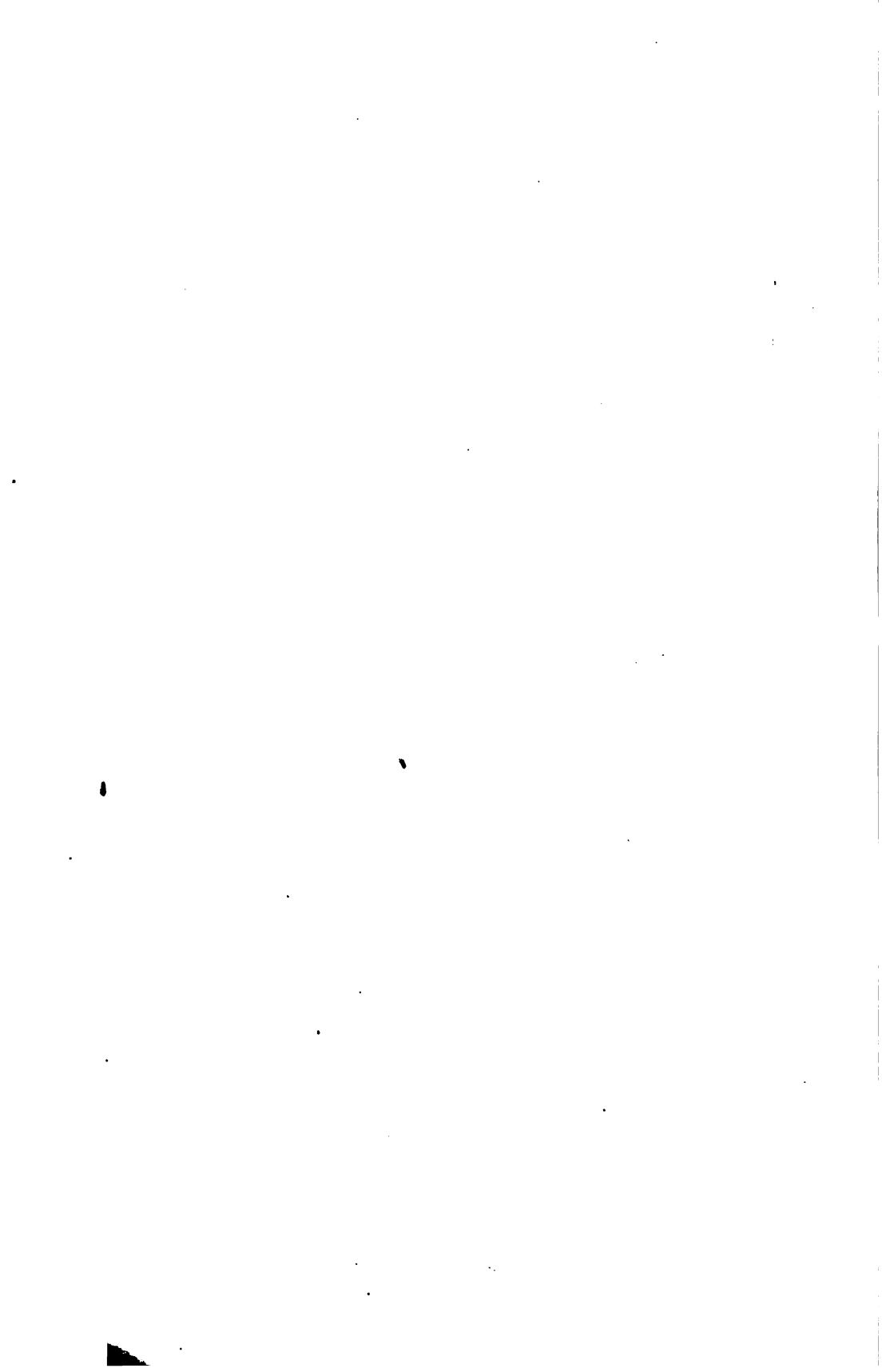
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Mason v. Searles.

have to say that as the motion to tax an attorney's fee was not made until after the appeal was taken we think it was very properly overruled. The court had reason to suppose that if the appeal was prosecuted a greater attorney's fee, or none at all, would be allowable. The defendants insist that the motion should have been overruled even if no appeal had been taken, because no attorney's fee can be taxed except upon evidence, and no evidence should be allowed except upon the main trial. In our opinion the taxation of an attorney's fee where it is to be taxed as costs is an independent matter, and that the fee may be taxed after the services are concluded and when it can be ascertained once for all what amount should be allowed. It might be otherwise if a jury was necessary, but in this case it was not. *Musser v. Crum*, 48 Iowa, 54.

Upon both appeals we think that the judgment should be

AFFIRMED.



REPORTS
OF
Cases in Law and Equity,
ARGUED AND DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
DES MOINES, DECEMBER TERM, A. D. 1881.

IN THE THIRTY-FIFTH YEAR OF THE STATE.

PRESENT:
HON. AUSTIN ADAMS, CHIEF JUSTICE.
" WILLIAM H. SEEVERS, }
" JAMES G. DAY, } JUDGES.
" JAMES H. ROTHROCK, }
" JOSEPH M. BECK, }

TABOR v. FOY.

1. **Mortgage: ASSIGNEE TAKES SUBJECT TO DEFENSES.** A mortgage is not a negotiable instrument, and an assignee, although purchasing before maturity, takes it subject to all defenses existing against it in the hands of the mortgagee.
2. **Practice in the Supreme Court: ACTION TRIABLE DE NOVO: ERRORS.** Neither the allowance of amendments to pleadings after decree, nor the improper admission or exclusion of evidence in the court below are grounds for reversal in an action triable *de novo* by the Supreme Court.

Tabor v. Foy.

Appeal from Lee District Court.

WEDNESDAY, OCTOBER 4.

ACTION in chancery to foreclose a mortgage. Upon a trial on the merits there was a decree dismissing plaintiff's petition and directing that the mortgage be canceled as prayed for in a cross bill filed by defendant. Plaintiff appeals. The facts of the case are set out in the opinion.

Hurley & Hale and *D. A. Sprague*, for appellant.

Van Valkenburg & Hamilton and *Craig & Collier*, for appellee.

BECK, J.—I. The mortgage, which is the foundation of plaintiff's action, purports to secure a promissory note for \$3,000, payable to J. P. Stevenson or order, and is alleged in the petition to have been executed by defendant. It was transferred by the payee before maturity and by a second indorsement reached the hands of plaintiff. The defendant in her answer alleges that the note was not signed by her and is a forgery. She admits the execution of the mortgage, but avers that it was procured by the fraud of the mortgagee, who represented that the instrument was to secure the payment of \$2,000, which he and his partner owed to a bank; that the mortgagee was her son-in-law and his partner her son, and on account of her relation to these parties she was willing to aid them by executing the mortgage, and she had full confidence in the truth of Stephenson's representation to her; that she did not read or hear read the mortgage, and was utterly ignorant of its contents, and that no consideration whatever was received by her on account of her execution of the instrument. She alleges that she was deceived and defrauded by Stephenson, and thereby induced to execute the mortgage for \$3,000 to him instead of a like instrument for \$2,000 to the bank, of which plaintiff had actual notice when

Tabor v. Foy.

the mortgage was transferred to him. The answer is made a cross bill and prays that the mortgage may be canceled. Other allegations of the petition need not be recited here. The plaintiff denies the averments of the petition and alleges that he acquired the note as a good faith indorsee and assignee before the maturity of the debt, and without notice of the defense set up by defendant.

II. The evidence shows that the mortgage was duly acknowledged and recorded, and that the note was indorsed and the mortgage assigned to plaintiff before maturity. In the view we take of the case, we need not consider the evidence upon which defendant claims that plaintiff had actual notice of her defenses when the note and mortgage were transferred to him.

We are of the opinion that the testimony satisfactorily shows that the note was not signed by defendant, and her signature thereto was forged by Stephenson. She testifies positively and directly to this effect, and her testimony is in some manner supported by other witnesses and circumstances disclosed by the evidence. It is shown that Stephenson, about the same time, had committed another forgery, which, in connection with the fact that he was not called upon to support the note, has some influence in leading our minds to the conclusion we have reached. Her positive testimony is assailed by the testimony of experts who testify, from comparison of the signature in question with other signatures supposed to be genuine, that they believe the name affixed to the note was written by defendant. Like testimony of other experts based upon comparison of the same writings disclose the belief on their part that the signature is a forgery. The expert testimony on both sides of the case has but little value from the rather singular fact that it is almost exclusively based upon the comparison of the signatures to the note and mortgage. While the signature to the mortgage is not denied by defendant, but indirectly admitted in her answer,

Tabor v. Foy.

the court below seems to have reached the conclusion that it was forged as well as the signature to the note. Defendant in her testimony does not testify as to the genuineness of the signature to the mortgage. If we are to regard it as genuine, it must be admitted that the expert testimony, being based almost alone upon the comparison of the signature in controversy with this signature to the mortgage, has not the weight it would possess had comparison been made with other signatures shown to be genuine.

III. The note being found to be forged no recovery can be based upon it. But plaintiff insists that as he is a good faith assignee for value of the mortgage, and acquired it before its maturity, he is entitled to recover. But the difficulty in the way of plaintiff's position is that the rule he relies upon prevails exclusively in commercial law and is applicable alone to the case of negotiable paper. The assignee of non-negotiable paper is not protected from defenses of the obligor or grantor arising on account of matters existing between the original parties to the paper, or on account of frauds perpetrated in procuring its execution. A mortgage is not a negotiable instrument, and the rule of commercial law invoked by plaintiff is not applicable to the case.

1. MORTGAGE:
assignee
takes subject
to defenses.

It will not do to say that defendant by executing the mortgage and putting it into circulation ought not to be permitted, as against an innocent holder, to allege that it is not binding upon her. The trouble with this position is that the doctrine of innocent holders has no application except as to holders of commercial paper. See *Pope & Slocum v. Jacobus*, 10 Iowa, 262; 1 Hilliard on Mortgages, p. 527, *et seq.*

The testimony clearly establishes that the mortgage was without consideration and procured by the fraud of Stephenson, whereby defendant was induced to execute the instrument to a party and for an amount not contemplated and agreed to by her. Stephenson could not have recovered upon

Tabor v. Foy.

the mortgage; plaintiff has no higher or better rights under the assignment.

IV. After the cause was tried and the decree signed defendant filed an amended pleading denying that she signed the mortgage and averring that her signature thereto was a forgery. The ruling of the court in permitting this amendment to be filed is alleged by plaintiff to be erroneous and the ground for the reversal of the decree of the court below. We may admit for the purpose of the case, without, however, deciding the point, that the amendment was erroneously allowed. Yet the error does not require the decree to be disturbed. The cause is tried *here de novo*. If we disregard the amendment and hold that defendant admits the execution of the mortgage, which we have done in the foregoing discussion, the plaintiff is not entitled to recover for the reason we have above stated. The amendment works no prejudice to plaintiff in this court, and is not, therefore, a ground for reversing the decree of the court below.

V. A deposition was read against plaintiff's objection on the ground that the witness was in court and his oral testimony should have been taken. We need not review the ruling of the court admitting the deposition for the reason that the witness, after his deposition was read, testified orally, and all matters which plaintiff desired to introduce in evidence through his testimony were, or could have been, called out upon his examination. The cause being tried *here de novo* will not be reversed for errors in the admission of the testimony which work no prejudice. Plaintiff has all the evidence which he thought proper to elicit upon the examination of the witness. His case is fairly before us in the condition he chose to present it. It may be tried upon the evidence he has introduced without inquiry as to the correctness of the ruling of the court in question.

Under Code, section 2742, as amended, the plaintiff was authorized to present the testimony of her witnesses or any part

2. PRACTICE
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action triable
de novo; er-
rors.

The State v. McGlothlen.

thereof in writing. The court, therefore, did not err in permitting her to read the deposition in question.

The foregoing discussion disposes of all questions arising in the case. The decree of the District Court is

AFFIRMED.

56	544
78	654
56	544
80	576

58	544
140	633

THE STATE V. MCGLOTHLEN.

1. **Evidence: PROCEEDING IN BASTARDY: DEGREE OF PROOF.** In a proceeding in bastardy, under section 4720 of the Code, a defendant may be found guilty upon the unsupported evidence of the prosecutrix.
2. —: —: —. Such an action is triable by ordinary proceedings and a preponderance of evidence, only, is necessary to a conviction.

Appeal from Monroe District Court.

WEDNESDAY, OCTOBER 4.

THE following complaint was filed in said court:

<p>“THE STATE OF IOWA, v. JACOB L. MCGLOTHLEN.</p>	}	<p><i>Complaint in Bastardy.</i></p>
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In the District Court of the State of Iowa, in and for Monroe county. I, Amanda Meeker, an unmarried woman, residing in the county of Monroe, in the State of Iowa, do hereby state and complain that I am now pregnant with a child, which, if born alive, will be a bastard. And I hereby charge and allege that Jacob L. McGlothlen, a resident of Wapello county, Iowa, is the father of said child. And I, the said Amanda Meeker, do on my oath say that the foregoing facts are true.

The defendant pleaded not guilty. Trial by jury, verdict guilty and judgment. The defendant appeals.

Perry & Townsend, for appellant.

Smith McPherson, Attorney General, for the State.

The State v. McGlothlen.

SEEVERS, J.—I. Counsel for defendant insists there was no evidence tending to show the guilt of the defendant except that of Amanda Meeker, the prosecutrix, and this being so the conviction cannot be sustained. The statute provides in cases of this character “the issue on the trial shall be guilty or not guilty, and shall be tried as an ordinary action.” Code, § 4720. An ordinary action is defined to be a civil action at law as distinguished from an equitable proceeding (Code, § 2507), and in such actions no corroboration of a witness, however much he may be interested in the result, is required to enable a party to recover.

It is further provided by statute that the defendant in prosecutions for “a rape or for enticing or taking away an unmarried female of previously chaste character for the purpose of prostitution, or aiding or assisting therein, or for seducing and debauching any unmarried female of previously chaste character, cannot be convicted upon the testimony of the person injured unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense.” Code, § 4560. Nor can a conviction be had upon the uncorroborated evidence of an accomplice. Code, § 4559. As it is provided by statute that corroboration is required in other cases and none in this, therefore, because of the statute, we hold a defendant may be convicted in a proceeding of this character upon the uncorroborated evidence of the prosecutrix.

II. The court refused to instruct the jury that they must be satisfied beyond a reasonable doubt the defendant was ¹ —: —: guilty before they could convict. This is said to be erroneous and *Barton v. Thompson*, 46 Iowa, 30, is relied on. This case has been overruled. *Welch v. Jungenheimer*, ante, 11. This case must be tried as an ordinary action in civil cases; the rule as to reasonable doubts prevailing in criminal cases does not apply, and there may be a conviction upon a preponderance of the evidence.

AFFIRMED.

Jeffrey v. The K. & D. M. R. Co.

JEFFREY V. THE K. & D. M. R. Co.

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89	571
56	546
100	528
56	546
110	44
56	546
113	92
56	546
118	386

1. **Railroads: PERSONAL INJURY: NEGLIGENCE.** The plaintiff was employed by the defendant on a construction train, and in the discharge of his duty he walked to the rear of the train while in motion; when within five feet of the rear end of the last flat car in front of the caboose the latter was uncoupled by the conductor, who warned the plaintiff to stop, and at a signal the engineer increased the speed of the train with a sudden jerk, which threw the plaintiff from the car and he was run over and injured. In an action to recover damages for such injury it was held that a verdict for the plaintiff was supported by the evidence.
2. —: —: **EVIDENCE.** In such an action it is competent for the plaintiff to show that the uncoupling of the cars while in motion was unusual.
3. —: —: —. It is not competent for a witness testifying in regard to the customary manner of operating trains to give an opinion as to the propriety or impropriety of a given method.
4. —: —: **INSTRUCTIONS.** The giving and refusal of instructions considered and held to be without error.

Appeal from Lee Circuit Court.

TUESDAY, OCTOBER 4.

THIS is an action at law to recover damages which it is alleged the plaintiff sustained while in the employment of the defendant by being run over by a car through the negligence of certain co-employees. The petition and answer were in the usual form, the plaintiff claiming that he was injured by reason of negligence in the persons having charge of said train, and averring due care on his part, and the defendant denying such negligence and pleading contributory negligence upon the part of the plaintiff. There was a trial by jury which resulted in a verdict and judgment for the plaintiff for \$5,500. Defendant appeals.

Gillmore & Anderson, for appellant.*Craig & Collier*, for appellee.

Jeffrey v. The K. & D. M. R. Co.

ROTHROCK, J.—I. The main facts attending the accident are not in dispute. They are as follows: The plaintiff entered the service of the defendant on the 10th day of July, 1876, as a shoveler on a construction train having its headquarters at Summit Station. On the 26th of August, 1876, this construction train was being employed in hauling dirt to certain places west of Summit Station, and as was its custom it was coming into the station to lay up for the night. The train consisted of an engine and tender, and a way car, and some ten or twelve flat cars. There were about forty laborers working on said train. There were two tool boxes, with a passage way between them, on or near the rear end of the last flat car, and next to the way car. The way car had a door in the end next to the car with the tool boxes. The train usually started from the dump about the time or before all the dirt was thrown from the cars, and as soon as the dirt was all removed the men walked along the train while it was in motion, deposited their tools in the tool boxes, and went into the way car to get their dinner buckets and any of their clothing which might be there, and then they usually returned to the front of the train, next the locomotive, so that they could get off opposite their boarding house. On the evening of the accident the plaintiff went back to the rear of the train for the purpose of getting his coat and dinner bucket. When he reached the rear of the last car, and was near the tool boxes, Mike O'Neil, the conductor of the train, was standing in the door of the caboose. The speed of the train had slackened somewhat, and O'Neil stopped one Caffey, who was in front of the plaintiff and about entering the way car, and warned him off. O'Neil stooped and pulled the pin which coupled the way car to the train, and raised up and signalled the engineer, who put on steam, which increased the speed of the train suddenly, producing a jerk, by reason of which the plaintiff and another of the employes fell in the opening made in the train by the uncoupling and increased speed, and were run over by the caboose. One of the

Jeffrey v. The K. & D. M. R. Co.

plaintiff's legs was broken and crushed in such a manner as to require amputation above the knee, and he was otherwise injured. The other employe who fell from the car at the same time was killed.

The theory of the plaintiff is that the conductor was negligent in uncoupling the car and giving the signal to the engineer, and that the engineer was negligent by putting on too much steam, suddenly producing a violent jerk which threw him from the car. Counsel for the defense contend that the plaintiff was guilty of contributory negligence by standing within from three to five feet of the end of the car, knowing that the conductor pulled the pin and made the signal, and knowing that the man in front of him had been warned of the danger; and by carelessly standing still without attempting to avoid injury to himself by any means whatever.

At the instance of the plaintiff the court submitted to the jury certain special interrogatories, which, with the answers thereto, were as follows:

"1st. Were the conductor and engineer on defendant's train guilty of negligence which was the proximate cause of the injury? Answer. Yes.

"2d. Did O'Neil see Jeffrey on the tool car before he, O'Neil, pulled the pin between the way car and tool car? Answer. Yes.

"3d. Did O'Neil know where Jeffrey was standing on the tool car at the time he gave the signal to the engineer to go ahead? Answer. Yes.

"4th. Did O'Neil or the engineer give Jeffrey any warning, which was reasonably sufficient to have put him on his guard against what followed? Answer. No.

"5th. Was it the act of the conductor and the engineer that put Jeffrey in a place of danger? Answer. Yes.

"6th. Did O'Neil see Jeffrey's position on the tool car in time to have avoided the injury to him by exercising ordinary care? Answer. Yes.

Jeffrey v. The K. & D. M. R. Co.

"7th. If you answer the sixth question yes, then answer the following question: Did O'Neil, after seeing Jeffrey's position on the tool car, exercise ordinary care and precaution to avoid injuring him? Answer. No."

Certain interrogatories were also submitted to the jury at the instance of the defendant, which with the answers are as follows:

"1st. How near the rear end of the tool car was the plaintiff standing at the time he fell off? Answer. From three to five feet.

"2d. Was not he standing too near the end of the tool car to be reasonably safe, at the time he fell off. Answer. No.

"3d. Was he not at the time he fell off standing so near the end of the tool car that his position was evidently dangerous, in case the speed of the car he was on was increased in an ordinary degree, unless he held on to something or braced against the start? Answer. No.

"4th. Did plaintiff make any efforts at all to secure himself against a forward movement on the car on which he stood? Answer. No.

"5th. If he did make such efforts, what were they? Answer. No effort.

"5th. Did plaintiff see the conductor pull the pin? Answer. Yes.

"7th. How much time elapsed after the conductor pulled the pin, and before the speed of the tool car was increased? Answer. About five seconds.

"8th. Was plaintiff exercising ordinary and reasonable care for his own safety after he saw the pin pulled, and up to the time he fell off? Answer. Yes.

"9th. Was what plaintiff saw the conductor do and heard him say in the way of uncoupling, giving warning and signal, reasonably sufficient to put plaintiff on his guard against what was likely to follow? Answer. No.

"10th. Does the evidence show that plaintiff's injury was

Jeffrey v. The K. & D. M. R. Co.

in consequence of the negligence of any of the employes of the company? Answer. Yes.

"11th. If you say it was, then which one was it? Answer. Conductor and engineer.

"12th. In what particular things did such negligence consist, if you say there was such negligence? Answer. In cutting train in two while in motion and unusual jerk.

"15th. Did not plaintiff know as much about what was going to happen after the signal to go ahead was given as O'Neil did? Answer. No.

"14th. If you have answered that the injury was in consequence of the negligence of the conductor, then state in what such negligence consisted? Answer. In cutting train in two while in motion.

"15th. If in consequence of the negligence of the engineer, then state in what such negligence consisted. Answer. By giving an unusual jerk.

"16th. Did not the conductor after giving the warning and signal he did give, and knowing that plaintiff saw what he was doing, have reasonable cause to believe that plaintiff could and would secure himself from ordinary jerk of the train? Answer. No.

"17th. Is it ordinary prudence for a man with plaintiff's experience about trains to stand the distance he was from the rear of a car about to be cut off, under the circumstances this car was? Answer. Yes.

"18th. Did the plaintiff see and understand the signal to go ahead? Answer. Yes.

"19th. Did he have reasonable cause to know from anything he saw or heard that the car on which he stood was about to be separated from the car next behind it? Answer. Yes."

Questions one, four, and five propounded at the instance of the plaintiff were objected to by the defendant because each was in fact composed of two questions. The objection urged

Jeffrey v. The K. & D. M. R. Co.

is that said questions joined the acts of the engineer and conductor, and required the jury to answer whether by their joint negligent acts the accident happened. These questions, it appears to us, submit a single proposition, and although they embrace the acts of two of defendant's employes they are still a single question. They are not such as tend to confuse a jury by requiring them to draw a conclusion from many facts. Further than this the jury appear to have fully comprehended the questions, as will appear by the answers to interrogatories ten and eleven, propounded at the instance of the defendant. The attention of the jury was there directed to the same subject and they distinctly and plainly answer that plaintiff was injured in consequence of the negligence of the conductor and engineer.

II. The defendant moved the court to set aside the verdict because the same was against the evidence, and because the answers to certain of the special findings were the result of prejudice, and were not sustained by the evidence, and for judgment for the defendant upon the special findings. These motions were overruled by the court.

The motion for judgment for the defendant on the special findings was correctly overruled for the simple reason that the answers to the special interrogatories do not show affirmatively that the defendant is entitled to judgment. In regard to the special interrogatories submitted to the jury in this case we deem it proper to say that the court would have been fully justified in refusing to submit many of them to the jury. It is not the purpose of the statute authorizing this practice to permit parties to submit a lengthy cross-examination of the jury upon every conceivable fact in the case, whether it be proximate or remote to the main inquiry. Such a procedure tends only to confusion. The questions propounded are framed from the standpoint of the party propounding them, and are often (unintentionally it may be) unfairly put.

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It is urged by counsel for the defendant that the special findings of the jury are inconsistent with each other and that the answers to the questions numbered 3, 8, 9, 13, 16 and 17 are so wanting in support from the evidence as to be "absolutely astounding." It is not our purpose to discuss these findings separately. We have carefully examined the evidence, which is fully presented in the record, and in addition to what has already been given as conceded facts in the case we will, without going into the testimony of the witnesses in detail, recite certain other facts which we think the jury were fairly warranted in finding from the evidence. When Jeffrey, the plaintiff, started for the rear of the train on the evening of the accident he was acting under the orders of those in charge of the train. The men were required to deposit their tools in the tool-boxes, and get their coats and buckets from the way car while the train was in motion. When he reached the tool boxes a man in front of him was about to step into the way car, and Jeffrey heard the conductor, O'Neil, say to him "stand back, do you want to get killed?" accompanying these words with an oath, and Jeffries testified "and I stopped where I was." Just as O'Neil said that, he pulled the pin, raised up, and the train was off with a sudden jerk, and Jeffrey was thrown from his feet and off the car. The jury were therefore warranted in finding that, up to the time when the plaintiff heard the warning to the man in advance of him, he was not only not negligent, but was acting under orders. Next, it is proper to consider the manner in which the way car was detached from the train. It appears that the uncoupling was made while the train was in motion, and the way car allowed to follow the train to save time in side tracking the train on one switch, and the way car and engine on another. And here it will be observed that the jury find, in answer to the fourteenth and fifteenth interrogatories propounded by the defendant, that the negligence of the conductor consisted in cutting the train in two while it was in motion, and that the negligence of the engineer consisted in "giving an

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unusual jerk." It may well be inquired why was it necessary to cut the train in two while in motion, and what emergency was there that prevented the brake from being applied on the way car, and why should the engineer give the train a sudden jerk without any signal, where there were some forty men on it whose duty required them to be passing from one end of the train to the other. One witness, who was standing near the train, testified that there was a terrible jerk in the train. Another says, "all at once I heard a tremendous jerk. It was an unusual bump or jolt. I didn't hear any gradual taking up of slack." Another testified as follows: "This was a big sound; it was a severe bump at one surge, as I noticed it; I did not notice anything gradual about it." Another witness testified to the effect that the whole transaction including the pulling of the pin, the signal, the unusual jerk, and the falling of the men upon the track was very suddenly done. One witness says he never knew the train to start so hard without ringing the bell or giving warning. Another states that the "jerk almost instantaneously followed the signal." But we have given enough to demonstrate that there was evidence which fairly warranted the jury in finding that the conductor and engineer were chargeable with negligence.

It is urged, however, that the plaintiff was chargeable with contributory negligence because he heard the warning to the man in front of him, saw the conductor pull the pin and give the signal, and knew that the speed of the train would be increased, and that there would be danger in standing from three to five feet from the end of the tool car without taking hold of the locks or hoops on the tool boxes, or some stakes or standards which were in reach. But there is nothing in all the evidence to charge the plaintiff with notice of the unusual jerk which followed the signal, nor to advise him that precautions against it were necessary. He had the right to assume that the forward movement of the train would be made in the usual manner.

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Much of the argument of counsel is devoted to what the plaintiff might have done to save himself from injury in the five seconds which the jury found intervened between the pulling of the pin and the jerk of the train. The jury have found that he was guilty of no negligence which contributed to the injury, and under all the circumstances surrounding the plaintiff, taking into consideration the exceedingly brief space of time intervening and the suddenness and violence of the jerk, which the plaintiff had no reason to apprehend, we are not prepared to say that the verdict should be disturbed, under the well known rule prevailing in this court. It will be understood that in reciting the foregoing facts we are giving only that phase of the case favorable to the plaintiff. That there was much testimony contradictory thereto is not to be denied. But our inquiry is, was the jury justified in finding as they did? We think they were, and that their verdict is fairly supported by the evidence.

III. The plaintiff was examined as a witness in his own behalf. Upon his re-examination he was asked by his counsel this question: "State whether or not after O'Neil gave the signal it occurred to your mind that there was a stake behind the tool box?" Another similar question was asked as to whether or not it occurred to his mind that there was a padlock on the tool box. Both of these questions were answered in the negative. The questions and answers were objected to by the defendant, and the objections were overruled. It is insisted that whether or not plaintiff thought of the means at hand by which he might have protected himself from injury is not the standard of care which was required of him.

We are united in the opinion that there was no prejudicial error in permitting this evidence to go to the jury. The writer hereof is of opinion that the defendant was precluded from objecting thereto, because in the cross-examination the plaintiff had been fully interrogated by counsel for defendant in regard to the stake and the padlock, and what he thought

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when O'Neil stooped and pulled the pin. As the defendant's counsel took it upon himself to cross-examine as to the operations of the plaintiff's mind at the time of, or immediately preceding, the accident, an objection to the same line of evidence upon the re-examination of the plaintiff was correctly overruled. Greenleaf on Ev., V. 1, Sec. 468.

A majority of the court, however, are of the opinion that the evidence in question was inadmissible, upon the ground that it was not competent for the plaintiff to exculpate himself from negligence by showing his own forgetfulness; but that under the circumstances of this case the defendant was not prejudiced thereby; that the plaintiff was not called upon to guard against a danger which he had no reason to apprehend. The accident arose from being jerked off the car. If he had no reason to apprehend such accident it cannot be said that it was the plaintiff's duty to seize the stake or lock upon the tool box, and it not being his duty it was wholly immaterial whether he thought of them or not. The special findings of the jury show that they never reached the question as to such duty. They found in answer to the second special interrogatory that the plaintiff was not standing too near the end of the tool car to be reasonably safe, at the time he fell off. This means, of course, so far as he had reason to apprehend. Again, they found in answer to the third special interrogatory that the plaintiff's position so near the rear end of the car, and without holding on to anything, was not evidently dangerous, upon the supposition that there was to be a mere ordinary increase of speed. For answer to the fifteenth special interrogatory they found that there was such increase of speed as to result in an unusual jerk. In answer to the ninth special interrogatory they found that the plaintiff did not have sufficient warning to put him on his guard against what was likely to follow, when he saw the pin pulled. This shows clearly that he did not have reason to apprehend the danger to which he became exposed. It is wholly immaterial, then, whether he had in mind the stake or the lock

upon the tool box. He could most certainly have made a forward movement a step or two and secured his safety completely. Yet the jury found that he was excusable. This must have been upon the sole ground that he had no reason to think it necessary to take hold of the stake or lock. Upon this reasoning the majority of the court think that though the evidence was not properly admissible it was not prejudicial.

IV. Next it is urged that the court erred in permitting an answer by a witness to the following question:

2. —: —: “How often had you seen O’Neil cut that car off ^{evidence.} while the train was in motion, and in the evening when they were running into the station to put up for the night?” The answer was in substance that the witness might have seen it done about twice, probably. This evidence was not incompetent. The theory of the plaintiff was that it was unusual to cut off the way-car in that manner, and there was evidence tending to show that the plaintiff had not been in a situation to see it done. It was perfectly proper to show that the act of which plaintiff complained was unusual.

V. Thomas Reilly, a railroad conductor, was examined as a witness and stated: “If I were going to cut a freight train a. —: —: in two, and run the engine and caboose on a side-track, I would first cut the train off in front of the caboose, then I would put the flat cars on the side-track, then run back with the engine and get the caboose and take it where I wanted it. *There would be no impropriety in cutting of the caboose while it was in motion.* The last sentence we have indicated by italics was stricken out on motion of the plaintiff. The ruling of the court was unquestionably correct. It was proper for the witness to state the customary manner of separating and side-tracking the cars, but the propriety of any given method was a question for the jury, after having all the facts and circumstances before it. The conclusion or judgment of the witness upon the question of cutting a train in two while in motion was not proper as expert tes-

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timony. *Hamilton v. The Des Moines Valley R. Co.*, 36 Iowa, 31; *Muldowney v. The I. C. R. Co.*, Id., 462; *Belair v. The C. & N. W. R. Co.*, 43 Id., 662.

VI. The court upon its own motion gave to the jury thirty-six instructions, which appear to cover every conceivable question in the case. None of these instructions excepting two are claimed to be positively erroneous. It is urged, however, that they are general, and only contain specific facts favorable to the plaintiff. The defendant asked the court to give to the jury fifty instructions. They were all refused. It is urged that the court erred in refusing to give the 4th of such instructions, which is as follows: "If it appear that the plaintiff, without any necessity for so doing, voluntarily left a place of safety in the front or center of the train, and went to the rear of the tool car, and while standing there saw and understood that the conductor was about to cut the way car off from the one on which plaintiff was standing, and knew what the effect would be, and that his position would be rendered dangerous thereby, and yet never made an effort to secure himself from injury, such conduct would render him guilty of contributory negligence."

This instruction was properly refused. If it had been given and the facts therein recited had been found by the jury to have been established by the evidence there must necessarily have been a verdict for the defendant. But the instruction omits one important fact, which is again and again referred to in the evidence, and that is whether or not the plaintiff had time, after he became aware of the danger, to save himself from injury. The same may be said of the 5th instruction asked and refused. See *McNamara v. Dratt*, 40 Iowa, 413.

VII. The 14th instruction asked and refused was as follows: "If plaintiff voluntarily or unnecessarily placed himself in a dangerous position, and was injured thereby, he cannot recover." Counsel in argument submits this instruction

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to us with the single remark "that it is a proper statement of the law." We think the court correctly refused the instruction, because a party may voluntarily and without actual necessity expose himself to danger and still not be chargeable with contributory negligence. That he was on the rear of the tool car of his own will, and without any actual necessity to be there, may be conceded, and still he may have been in the discharge of his duty as an employe of the defendant.

VIII. The sixteenth instruction asked and refused was as follows:

"The standing or being within two or three feet of the rear end of a flat car without being secure against jerks usual and incident to the handling of such cars, while the train was in motion, is of itself negligence, and if you find that plaintiff voluntarily placed himself in that situation your verdict must be for defendant." The eighteenth instruction was in substance the same. The refusal to give them to the jury is assigned as error.

These propositions, like instruction number 14, in effect state the rule to be that if plaintiff was in a dangerous position he cannot recover. It was for the jury to determine the question of contributory negligence, in the light of all the facts and circumstances surrounding the plaintiff at the time of the accident, and not from the mere fact of plaintiff being in a dangerous position, although he may have been in such position voluntarily.

IX. Lastly it is urged that the court erred in refusing to give the 20th instruction asked by defendant. It is as follows: "It is claimed by plaintiff's counsel in argument that although plaintiff himself was negligent, yet that if the conductor, O'Neil, saw his dangerous position, and by the exercise of ordinary care could have avoided the injury, and if he failed to exercise such care, plaintiff could nevertheless recover. The court instructs you no such issue is made in the case, and the failure of O'Neil to do so would not render defendant liable if the plaintiff was himself negligent."

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In the state of the record before us we do not deem it proper to determine the question argued by counsel, as to the necessity of pleading specially the facts necessary to recover where it is found that the plaintiff was negligent, but that such negligence should not be imputed to him because the employes of defendant failed to exercise proper care to avoid the injury after the discovery of plaintiff's negligence. If it should be held that such special pleading was necessary, the refusal to give the instruction asked and the giving of the converse of the proposition by the court was error without prejudice. The jury in their deliberations did not reach that question, but on the contrary they expressly found that the plaintiff was without fault or negligence. Having thus found, the question as to plaintiff's negligence and defendant's fault thereafter did not become a part of the case, and the giving of the instruction complained of and the refusal to give that asked could not have been prejudicial to the defendant.

AFFIRMED.

THE UNION NATIONAL BANK OF CHICAGO V. BARBER ET AL.

1. **Promissory Note: HOLDER OF: WHEN TAKEN AS COLLATERAL.**
One who receives a promissory note as collateral security for an antecedent debt, upon which no extension is granted, does not become a *bona fide* holder for value.
2. —: —: **PRESUMPTION OF OWNERSHIP.** The holder of a promissory note is presumed to be the owner thereof by a *bona fide* transfer for value, but such presumption is rebutted by evidence showing that the note is in fact the property of another, from whose possession it was procured by fraud.
3. **Practice: PLEADING: WAIVER OF IRREGULARITY.** Where a material allegation is omitted from a pleading, but the adverse party fails to demur thereto, and himself tenders an issue upon the point, which issue is found against him, the judgment based on such finding will not be reversed on account of the irregularity.

56	559
89	461
56	559
103	585
56	559
106	559
56	559
106	542
56	559
109	688
56	559
121	647
56	559
137	383

Appeal from Benton District Court.

TUESDAY, OCTOBER 4.

ACTION to foreclose a mortgage given to secure two promissory notes executed by the defendant Barber to one J. C. Fulkerson, and made payable to him or bearer. The intervenor, S. B. Fulkerson, claimed to own the notes. The maker of the notes, Barber, makes no defense, and the only question presented is in regard to the ownership. The court found that they were owned by the intervenor, and dismissed the plaintiff's petition. The plaintiff appeals.

Preston Bros., for appellant.

Gilchrist & Haines, for appellee.

ADAMS, CH. J.—The intervenor averred in his petition that he purchased the notes of the payee through one Twogood as his agent; that Twogood retained the notes for collection; that while they were so held by Twogood, one Elliott, a partner of Twogood, wrongfully obtained possession of the notes, and wrongfully and fraudulently indorsed and transferred the same to the plaintiff. He further averred that the plaintiff has no right or interest in them, but that they belong to him. He did not aver that the plaintiff is not a *bona fide* holder for value. But the plaintiff for answer to the petition for intervention not only denied the allegations of the petition, but averred that it was a *bona fide* holder for value, and this averment the intervenor by reply denied.

Upon the trial the plaintiff introduced in evidence the notes. The intervenor then introduced evidence which proved very clearly all the allegations of his petition. The plaintiff then introduced evidence showing that it took the notes from Elliott as collateral security for indebtedness due from Twogood & Elliott, and without notice of the true ownership. Upon cross-examination of the plaintiff's witnesses it was

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made to appear that the indebtedness for which the notes were taken as collateral security was in part, at least, an antecedent indebtedness, but it was not shown by them or any other witness that the indebtedness was wholly such, nor was it shown that no extension was given on indebtedness that was confessedly antecedent.

But the plaintiff insists that if it should be conceded that the indebtedness was wholly antecedent, and that no extension was given, it should nevertheless be allowed to recover as a holder for value. In support of this proposition the plaintiff cites *Crosby v. Tanner*, 40 Iowa, 136. But in our opinion that case is not applicable. The question determined there was as to whether the equity of a third person, who was not a party to the note, could be set up to defeat the mortgage by which the note was secured, and simply upon the ground that the holder took the note after maturity. It was held that such equity could not be set up. The question in the case at bar is as to whether the intervenor's title can be defeated by reason of the wrongful indorsement and delivery made by Elliott to the plaintiff. It certainly cannot unless the plaintiff is a holder for value. Now the mere fact that the plaintiff took the notes as collateral security would not show that it is a holder for value. It would not be such if they were taken wholly as collateral security for an antecedent indebtedness, and no extension was given. *Ryan v. Chew*, 13 Iowa, 589. As the evidence fails to show that the notes were taken wholly as collateral security for an antecedent indebtedness without extension, and at the same time fails to show that they were not, we have to determine whether under the evidence the plaintiff is to be *presumed* to be a holder for value.

The plaintiff claims that the fact that the notes came from its possession is sufficient to raise a presumption that it paid value. Authority can be found to support this proposition, and for the purposes of this opinion it may be conceded. But if such presumption was raised by

1. PROMIS-
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the evidence of possession we think it was overcome by the evidence introduced by the intervenor showing his title to the notes, and the wrongful indorsement and delivery by Elliott to the plaintiff. In 2 Daniel on Negotiable Instruments, 412, the author says: "The legal presumption is that the holder of a note is not a finder, but a *bona fide* transferee for value. When, however, the loss of the original owner is shown, the burden of proof shifts and the holder must show that he acquired it in good faith for value." See, also, *Morton v. Rogers*, 14 Wend., 581; *Graves v. American Exchange Bank*, 17 N. Y., 205; *Matthews v. Poythress*, 4 Geo., 305; *Gerrard v. Pittsburgh*, 29 Pa. St., 157.

The rule enunciated finds support also in numerous analogous decisions where the maker proves that the note was procured from him by fraud. *Listerman v. Field*, 9 Gray, 33; *Perrin v. Noyes*, 39 Me., 384; *Smith v. Sac County*, 11 Wall., 139; *Devlin v. Clark*, 31 Mo., 22; *Perkins v. Prout*, 47 N. H., 337; *Harbison v. Bank of Indiana*, 28 Ind., 133; *Bailey v. Bidwell*, 13 M. & W., 73; *Fitch v. Jones*, 32 Eng. Law and Eq., 134. The same doctrine is recognized by the text writers. Chitty on Bills, 260; Byles on Bills, 190; 2 Parsons on Bills and Notes, 438; Story on Promissory Notes, 196.

The principle upon which the rule is based is said in 1st Daniel on Negotiable Instruments, 611, to consist in the fact that "there is a natural presumption that an instrument so issued—that is, by fraudulent procurement—would be quickly transferred to another, and unless he gave value, which could be easily proved if given, it would perpetrate great injustice and reward fraud to allow him to recover."

Why for the same reason the holder of a negotiable note which he had received from a person who had stolen it, or otherwise wrongfully obtained it and made a fraudulent transfer of it, should not upon an issue as to title have the burden of proving, otherwise than merely presumptively by evidence of possession, that he paid value, we are unable to

discover. The ease with which the holder could prove that he paid value if he did pay it, and the difficulty with which the true owner could prove that the holder did not pay value if he did not pay it, would not be less than in a case where the validity of a negotiable note is drawn in issue in an action against the maker.

It is true that in *Kelly v. Ford*, 4 Iowa, 140, a different doctrine might seem to be held. That was an action upon a promissory note in which the maker pleaded fraud. Stockton, J., said: "A jury would not be authorized by any evidence of fraud to infer that the note was assigned after maturity, or that no consideration was paid for it by the holder." The view which the learned judge took of the law is further shown by a remark made concerning an instruction which the defendant asked and which was refused. The instruction was in these words: "Where fraud or illegality is established there is a presumption of law that there was no consideration paid by the assignee to the assignor for the transfer of the note; but the presumption of law is that the payee not being able to sue in his own name has handed it over to another person to sue upon it for his benefit. This presumption, so raised by law, must be rebutted by the holder showing that he gave value for the note."

After holding that the instruction was properly refused because there was no evidence of fraud, the learned judge proceeded to remark that the instruction was incorrect and properly refused, because it did not rightly state the law. In support of his view he cites *Morton v. Rogers*, 14 Wend., 580; and *Vallett v. Parker*, 6 Wend., 621. An examination of these authorities, we think, will show that the learned judge did not apprehend their full import. Besides, as no fraud was shown it was unnecessary to consider the question as to what the correct rule would have been if it had been shown. We can hardly think, therefore, that the attention of the court was drawn to this question.

We have now to consider one other point made by the

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plaintiff, and that is that the pleadings did not justify the decree rendered, even if the evidence did. The plaintiff contends that it was incumbent upon the intervenor, in order to maintain his claim, to aver in his petition for intervention that the plaintiff did not pay value for the notes.

2. PRACTICE:
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It was certainly not incumbent upon the plaintiff to aver in its petition that it paid value. As against the maker having no defense the plaintiff was entitled to recover even if it held the notes wholly as collateral security for an antecedent indebtedness and without other consideration. It would, indeed, as against the maker having no defense, have been entitled to recover if it had held the notes as a gift. The intervenor, in order to affect the plaintiff's right to recover, was obliged to rely upon a fact not material prior to intervention. It is possible, therefore, that the petition for intervention was demurrable. That it would seem to be indicated by *Clapp v. Cedar County*, 5 Iowa, 15, an authority cited by the plaintiff and relied upon by it with great confidence. In that case it was held in substance that in order to let in the defense of fraud in the procurement of a negotiable instrument as against a holder who has taken the instrument before maturity without notice, it is incumbent upon the maker to aver that the holder did not pay value.

We have no occasion now to express an opinion as to the correctness of that ruling. If it should be conceded to be correct it would not change the rule of evidence above expressed. The averment that the holder did not pay value would be presumptively supported by proof by the defendant of the fraud, where that was the defense, or, in a case like the present, by proof by the intervenor of the true ownership, and wrongful abstraction and transfer.

The important consideration, in determining the correctness of the decree below, is, that while it may be that the intervenor should have averred in his petition for intervention that the plaintiff did not pay value, yet the petition for inter-

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vention was not demurred to, but on the other hand the plaintiff tendered an issue upon this point by averring that it did pay value; and upon that issue the parties went to trial and upon that issue the court must have found that the plaintiff did not pay value. The evidence being sufficient to support the finding we cannot reverse by reason of a mere irregularity, if there was any, in the manner in which the issue was made. *Cotes v. City of Davenport*, 9 Iowa, 227; *Atkins v. Faulkner*, 11 Iowa, 327; *Cook v. Woodbury County*, 13 Iowa, 21. In our opinion the decree must be

AFFIRMED.

BEVER V. BROWN ET AL.

- 1. Arbitrator: MISCONDUCT OF.** While an arbitrator is protected from civil liability for his acts, the fact that his willful misconduct rendered the award invalid and unavailing to the parties may be shown by them to defeat a recovery in an action to recover for his services as such arbitrator.

Appeal from the Superior Court of Cedar Rapids.

THURSDAY, OCTOBER 5.

On the 19th day of February, 1880, O. C. L. Jones commenced this action against Wm. Harper, Amos Harper, N. B. Brown and Harry T. Brown, upon a bond executed by William Harper and N. B. Brown, as principals, and Amos Harper and Harry T. Brown, as sureties, to O. C. L. Jones, W. S. Taylor and J. H. Camburn, conditioned for the payment to them of their fees as arbitrators, in an arbitration pending between N. B. Brown and Wm. Harper, to be estimated at the rate of ten dollars per day each, and paid when the said Taylor, Camburn and Jones shall be ready to submit their finding to the Linn District Court, but in no case to be delayed beyond the 1st day of March, 1879. The plaintiff alleged that he performed services as such arbitrator for

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twenty-four days, and that the ultimate time limited in the bond for payment has long since elapsed. The plaintiff prays judgment for two hundred and forty dollars, and interest.

On the 19th day of March, 1880, the defendants N. B. Brown and Harry T. Brown answered admitting the execution and delivery of the bond set out by plaintiff, the appointment of said persons as arbitrators, and that plaintiff acted as one of the same for the time stated and at the price named. Defendants further answering allege that during the time said arbitration was pending said plaintiff and said J. H. Camburn combined and conspired together corruptly to wrong and defraud defendant, N. B. Brown, in making and filing said award; that plaintiff and said J. H. Camburn, in pursuance of such design and conspiracy, after a legal adjournment of said board of arbitration had been made, and before either party to said arbitration had submitted the same to said board, and before plaintiff had time or opportunity to fully present his testimony, and without any legal meeting of said board of arbitration, plaintiff and said J. H. Camburn corruptly made and caused to be filed in the District Court of Linn county a final report and award of arbitration, finding therein that said Brown was indebted to Wm. Harper in the sum of \$41,000, falsely reporting therein that they had heard said matter of arbitration fully, and falsely and corruptly pretending that said matter of arbitration had been regularly heard and submitted, and that it was a just and correct finding of the matters submitted to them in the articles of submission, and falsely and corruptly pretending that said report was final, and covered all matters submitted to them by said articles, and that said cause had been closed by the respective parties, all of which was false, and well known by said parties to be false; that it was well known to said plaintiff and said Camburn, at the time said report and award were made, that the evidence had not been closed, and that defendants' attorneys had had no time or opportunity to argue or present said cause, and that the pleadings and evi-

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dence were in such a shape that no intelligent opinion could be formed as to the real merits of the matters submitted to them as arbitrators; but said plaintiff and said Camburn, disregarding the rights of defendant N. B. Brown, and their duties in the premises, corruptly and fraudulently made said report and award as stated, and without the knowledge or consent of defendant N. B. Brown, and in the absence of the other arbitrator, W. S. Taylor, and without his concurrence or consent, and without a legal or regular meeting.

That by reason of such illegal acts and wrongs, committed by plaintiff and said Camburn, said matter of award was by order of the District Court of Linn county, Iowa, re-submitted to said arbitrators at the October term, 1879, and it was ordered by said court that the same be heard anew.

That in consequence of said wrongful and illegal acts, and the order of said court made by reason thereof, the finding of said arbitrators was of no value and was void, and the services of said plaintiff were useless and of no effect by reason thereof.

That by reason thereof, plaintiff should not be allowed to recover in this action for said services.

On the 4th day of October the death of the plaintiff was suggested, and J. L. Bever, his administrator, was substituted as plaintiff. The death of the defendant, N. B. Brown, was also suggested, and Susan Brown, his administratrix, was substituted as a party defendant. The defendants, Susan Brown and H. T. Brown, pending the trial, filed an amendment to the answer alleging that by the terms of submission the award was to be valid if legally made and signed by two arbitrators. Afterward the defendants Susan Brown and H. T. Brown filed a second amendment to their answer alleging that the whole matter of said award was filed and settled by O. C. L. Jones and said Camburn after said persons had legally adjourned as a board of arbitrators, and before again assembling in pursuance of such adjournment, and at a time when they had no legal right, authority or jurisdiction to act,

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and in the absence of all parties in interest and their attorneys, and without the knowledge or consent of said N. B. Brown, and before either party had submitted their respective claims or had submitted or argued their respective causes before said arbitrators; that said Jones and Camburn made said award in the absence of W. S. Taylor, the other arbitrator, and without affording him an opportunity to take part in the same or to be present when the same was made and signed; that said Jones and Camburn delegated their duties connected with the making and filing of said award to persons wholly unauthorized by the terms of submission to act in the premises, and that said Jones signed the same without any personal knowledge of its correctness; that the final award made and signed by said Jones and Camburn and Taylor was made and signed in violation of an injunction duly served on Jones and Camburn, issued by the Linn District Court in an action wherein N. B. Brown was plaintiff, and Wm. Harper, J. H. Camburn, O. C. L. Jones, and others were defendants. The court rejected all the testimony offered by the defendants, and instructed the jury to return a verdict for the plaintiff. The defendants appeal.

Rickel, West & Eastman, for appellants.

Mills & Keeler, for appellee.

DAY, J. When this case was before us on a former appeal it was held that a demurrer to a counter claim for damages, alleging the same facts as those now relied upon as a defense, was properly sustained. See *Jones v. Brown*, 54 Iowa, 74. It was held that the arbitrators acted in a judicial capacity, and could not be held liable in a civil action for damages for an award, although alleged to have been made fraudulently and corruptly. It is but a corollary of this decision that the claim of the arbitrators for compensation for their services cannot be recouped by damages to the extent of the claim, for making a fraudulent and

1. ARBITRA-
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corrupt award. But we have now involved in this case a different question. The answer alleges that because of the wrongful and illegal acts of the arbitrators the award by them made was by order of the court re-submitted and the finding of the arbitrators was void and of no value, and the services of the plaintiff were useless and of no effect. The answer does not seek to recoup the plaintiff's claim with damages, but alleges a want of consideration growing out of the fact that the services of the plaintiff, owing to his misconduct, were useless and of no value. We have now the question whether the rule of judicial immunity which protects an arbitrator from liability for damages for a fraudulent and corrupt award goes also to the extent of inhibiting all proof that the award was valueless on account of the corrupt and willful misconduct of the arbitrator, for the purpose of defeating the arbitrator's claim for compensation for his services. In this case the arbitrators made an agreement with the parties to the suit for compensation at the rate of ten dollars per day. Now whilst the arbitrators did not contract for the possession of perfect judgment, and did not undertake to make an award which should be sustained by the court, there was, we think, an implied undertaking that they would not by their corrupt and fraudulent practices render their award valueless to the parties. We think that the rule of judicial immunity goes far enough when it protects the arbitrators from an action for damages, without allowing them compensation for an act rendered useless by their willful misconduct. This seems to have been the view originally entertained by the court below, for whilst it sustained a demurrer to the counter claim for damages, it overruled a demurrer to the answer which set up the same facts as a defense to the plaintiff's claim. When the case came on for hearing, however, the court rejected all evidence offered by the defendants and instructed the jury to return a verdict for the plaintiff for the amount claimed. The defendant offered amongst other things to prove that Jones delegated to a third party,

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not one of the arbitrators, his duties as arbitrator, and that said person, together with J. H. Camburn, made up and prepared said award, and that said person had no right or authority from N. B. Brown or any one acting for him; that Jones and Camburn knowingly allowed, in making up said award, large amounts upon which no proof had been offered, and large amounts upon which proof had only been partially submitted, when they well knew that N. B. Brown and William Harper desired to introduce further proof in relation to the same, and before the same had been submitted by either party to said arbitrators; that some days before the making of the award said arbitrators had adjourned the hearing to a time and place fixed, whereof notice was given to all parties interested, and that several days before said time arrived Jones and Camburn proceeded, in the absence of all parties interested, and in the absence of W. S. Taylor, one of the arbitrators, and without notice to him, and without consent of parties, to make and sign an award, and retained said award, and refused to make the same known or public, or to file the same, until the 7th of April, 1879; that at the time the award was signed by Camburn and Jones the time limited for making and filing an award had expired; that Jones did not know what it contained; that he did not know whether it contained any of the credits that should be allowed to Brown; that he did not know but what double the amount that Harper was entitled to was allowed in the award. The defendants also offered to prove that the award was re-committed. This proof should have been admitted for the purpose of showing that the award was rendered unavailing to the parties, through misconduct of the arbitrators.

REVERSED.

BARTON V. THOMPSON.

1. **Evidence: PROOF OF GOOD CHARACTER: WHEN ADMISSIBLE IN CIVIL ACTION:** In a civil action evidence of the good character of the defendant is only admissible where intention is the point in issue and the proof consists of slight circumstances.
2. **Practice: LAW OF THE CASE: WHAT IS.** While in general a decision of the Supreme Court constitutes the law of the case in which it is made, yet if such decision is overruled before the final trial of the case it is the duty of the inferior court in such trial to follow the rule last established.

Appeal from Mitchell Circuit Court.

WEDNESDAY, OCTOBER 5.

THIS is an action to recover damages for the alleged willfully and maliciously setting fire to and causing to be burned certain stacks of wheat of the plaintiff. There was a jury trial, resulting in a verdict and judgment for the defendant. The plaintiff appeals. This is the same case that was before the court upon a former appeal. See 46 Iowa, 30.

D. W. Poindexter and Starr & Harrison, for appellant.

C. D. Ellis and L. M. Ryce, for appellee.

DAY J.—I. The court instructed the jury, in substance, that evidence of the defendant's prior good character was to be weighed and considered by them, and if therefrom a reasonable doubt was raised it was their duty to find for the defendant. In civil cases evidence of general character is not admitted unless the nature of the action involves the general character of the party, or goes directly to affect it. 1 Greenleaf on Evidence, Sec. 54, and authorities cited in note 3. But "generally in actions of tort, where the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it." *Id.* The better doctrine seems to be that evidence of good character should be confined to cases

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 Barton v. Thompson.

where intention is the point in issue, and the proof consists of slight circumstances. This is the rule which was established in the leading case of *Ruan v. Perry*, 3 Caines. 120. Beyond the rule recognized in this case, the best considered cases have not extended the admissibility of evidence of good character in a civil action. That such evidence is not entitled to consideration in a case such as this is clearly established by the following authorities: *Fowler v. Aetna Fire Ins. Co.*, 6 Cowan, 673; *Schmidt v. N. Y. Ins. Co.*, 1 Gray, 535; *Attorney General v. Bowman*, 2 Bos. and Rol., 532; *Humphrey v. Humphrey*, 7 Conn., 116. The court erred in giving the instructions under consideration.

II. Upon the trial of this case the court instructed, in harmony with the rule adopted upon the former appeal, that
2. PRACTICE: it is incumbent upon the plaintiff, in order to a law of the case; what is. recovery, to prove the facts alleged beyond a reasonable doubt. Since the trial of this case in the court below the case of *Barton v. Thompson*, 46 Iowa, 30, has been overruled. See *Welch v. Jugenheimer*, ante, 11. It is the established doctrine of the courts that a decision once made in a case constitutes the law of the particular case, and will not upon a subsequent appeal in the same case be overruled or examined, however well satisfied this court may be that it is erroneous. *Adams County v. B. & M. R. Co.*, 55 Iowa, 94, and authorities cited. As the court below followed the rule originally adopted in this case, we would not feel justified, under the authorities above referred to, in adopting a different rule upon this appeal, which would lead to a reversal of the case. But, as it becomes necessary to reverse this case upon other grounds, and as the rule originally adopted has been overruled in another case, and is no longer the law of the State, it will be the duty of the court in the further prosecution of this case to follow the rule adopted in *Welch v. Jugenheimer*, supra.

For the error considered in the first branch of this opinion the judgment is

REVERSED.

PLACE V. THE DISTRICT TOWNSHIP OF COLFAX.

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1. **Schools: TEACHER'S CONTRACT: WHEN NOT ENFORCEABLE.** No recovery can be had on a contract to teach school, made with a subdirector but not approved by the president of the board, unless such approval has been waived and the contract ratified by the district; the fact that the teacher proceeds thereunder and completes the performance of the contract is not sufficient to constitute such ratification and authorize a recovery. ADAMS, J., *dissenting*.

Appeal from Grundy District Court.

WEDNESDAY, OCTOBER 5.

ACTION to recover for services in teaching school in sub-district No. 4, in the defendant district township. Trial by jury and verdict and judgment for the plaintiff for the amount claimed. The defendant appeals.

Rice & Foster, for appellant.

Rea & Smyth, for appellee.

ROTHROCK, J.—On the 21st day of March, 1879, the plaintiff entered into a written contract with one B. Mayer, subdirector of subdistrict No. 4, whereby she agreed to teach the school in said subdistrict for the term of twelve weeks, commencing April 7, 1879. On that day she commenced teaching and taught the full term. The defendant refuses to pay for her services because the written contract entered into between her and the subdirector never received the approval of the president of the board of directors.

The power to make contracts employing teachers is vested in the subdirector of the subdistrict, and all such contracts made in accordance with the provisions of the law shall be approved by the president of the board. Code, § 1753. It becomes the duty, then, of the president of the board to determine whether the contract conforms to the provisions of

1. SCHOOLS:
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Place v. The District Township of Colfax.

the law, and to give or withhold his approval according as he shall find the fact to be. *Thompson v. Linn*, 35 Iowa, 361. If he should determine to withhold his approval, although erroneously, the written contract would be incomplete, and in advance of anything being done under the contract no action could be maintained thereon. *Gambrell v. District Township of Lenox*, 54 Iowa, 417. Where, however, the teacher has in good faith performed the contract in the absence of any objection on the part of the district, or there has been part payment for the services rendered, or there have been other acts upon the part of the district evincing an intention to ratify the contract and waive its formal approval by the president of the board, an action may be maintained, and the teacher may recover for the services rendered. *Athearn v. The Ind. Dist. of Millersburg*, 33 Iowa, 105; *Connor v. Dist. Township of Ludlow*, 35 Id., 375; *Cook v. Ind. Dist. of North McGregor*, 40 Id., 444.

Among other instructions given by the court to the jury we find the following:

"10. If you find that the plaintiff entered into the contract with the subdirector, and you further find that she performed her contract, that there was no legal objection to her teaching, she is entitled to her pay, and you should so find and return your verdict for her for the amount of the value of her services under the contract."

In the twelfth paragraph of the charge the jury were instructed in substance that if the president of the board neglects to approve the contract, and the person employed performs the same, the teacher should not be deprived of compensation for services rendered.

These instructions are independent propositions, and are in no manner qualified by any other instructions in the case. The facts were that the president refused to approve the contract because of certain objections made to the plaintiff as a teacher. Before the plaintiff commenced to teach the president of the board gave her notice that he would not approve

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the contract. The instructions above set out are erroneous because they entirely ignore the question as to whether or not the services of the plaintiff were accepted, and the contract ratified by the district township. Under these instructions the plaintiff could recover in defiance of the district board, and no protest nor objection would be of any avail, provided she was not forcibly ejected from the school-house but continued to teach therein for the term provided for in the contract. That such is not the law is abundantly established by the authorities above cited, in all of which in addition to the performance by the teacher there was part performance by the district by the payment for part of the services rendered. We have no disposition to disturb the rulings heretofore made on this question. If we were to adopt the rule of the instructions above quoted it would enable a subdirector to employ a teacher against the consent of the patrons of the school, against the protest of the board of directors, and authorize a recovery for services rendered with a knowledge that the omission to approve the contract was not mere oversight and inadvertence, but intentional and with the purpose that it should not be ratified.

II. The amount in controversy as shown by the pleadings was less than \$100. Some question is made by counsel for appellee as to whether or not the certificate authorizing the appeal is sufficient to confer jurisdiction upon this court. It appears to us to be sufficient. It especially refers to the case as contained in the instructions above discussed.

REVERSED.

ADAMS, CH. J., *dissenting*.—The defendant school district, after it has had the benefit of the plaintiff's services as a teacher, seeks to avoid paying her upon the technical ground that she taught without a written contract. But I am unable to conclude that under the statute, and the decisions of this court made thereon, the defense can be sustained. It is true, if there was only an oral contract no right of action would

accrue thereon by reason of a mere offer to perform. *Gambrell v. District Township*, above cited. But it is equally true that there may be a recovery where the contract has been performed, though the same was not in writing. *A'hearn v. Independent District*, and other cases above cited. But it is said that this is so only where the services are accepted and the contract ratified by the school district; and the instructions given allowing a recovery in this case are held by the majority to be erroneous because the right of recovery was not expressly conditioned upon acceptance and ratification by the school district. The right of recovery was conditioned upon the performance of the contract by the plaintiff, and the absence of all legal objections to her teaching. Now I am not prepared to say that mere performance and absence of legal objections would show acceptance and ratification by the school district. But the undisputed facts in this case are that the plaintiff was told by the subdirector to proceed and perform her contract, notwithstanding it was not in writing, and she did proceed with his knowledge and approval. He alone had power to contract in behalf of the school district, and he alone had the control and management of the school house. Code, § 1753. The school district, then, through him, as its legally constituted officer, gave her possession of the school-house until she should perform her contract. I think that the action of the subdirector as shown by the undisputed evidence must be taken as evincing acceptance by the school district of the plaintiff's services. If so, the instructions were not prejudicial even though they might, and perhaps should, properly, have been more explicit.

The objection made by the majority of the court to the instructions that the rule held by them would enable a subdirector to employ a teacher against the consent of the patrons of the school, and against the protest of the board of directors, is not to my mind valid. The law does not give the power to employ a teacher to the patrons of the school nor to the board of directors, nor does it make their consent necessary.

The subdirector, who alone is vested with the power to employ a teacher, may properly enough in the exercise of his discretion have some deference to the wishes of the patrons of the school, and possibly to the wishes of his co-directors. But in the absence of any rules or restrictions imposed upon him by the board, his judgment must in contemplation of law be his sole guide.

When he has employed a teacher it is to be presumed that his judgment has been properly exercised; and when a written contract has been drawn and signed by both subdirector and teacher it becomes the imperative duty of the president to approve and file it, if it conforms to the law and rules of the board. *Thompson v. Linn*, above cited. It is not for the president to exercise the slightest judgment in regard to the person employed, nor take any one's opinion in regard to the person. The difficulty in this matter commenced by the president's listening to objections made against the plaintiff by certain persons who were opposed to her, and by his wrongfully and unlawfully making such objections the ground of his refusal to approve the written contract.

The majority opinion seems to proceed upon the theory that he is vested with a discretion, in order to protect the school district against the employment of an unsuitable person. But that is evidently not the theory of the law. His approval pertains to a different subject. If the president had performed the duty in this matter imperatively devolved upon him by the law he would have approved the contract. There were no legal objections to it so far as I can discover. If he had approved it as he should have done there would not have been any additional guaranty to the plaintiff's qualifications. But the law afforded ample protection against a want of qualifications. There is no ground for complaint in this respect.

My view of this case is that certain disaffected individuals sought by an irregular and unauthorized way to defeat the

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subdirector's lawful selection of a teacher. Having failed in that they now seek to deprive her of her pay.

The harmony of school districts, the prosperity of the schools, the feeling of good neighborhood, all require that school officers should be kept strictly within the line of their duty, and that no one should be allowed to make any unlawful interference therewith.

I think that the plaintiff was entitled to recover, and I see no prejudicial error in any ruling by which recovery was had.

SHEARER ET AL. V. WEAVER ET AL.

- 1. Adoption: REQUISITES OF: RIGHT OF INHERITANCE.** Rights of inheritance can only be acquired through adoption by a full compliance with the provisions of the statute; where articles of adoption are properly executed, but are not recorded during the lifetime of the person adopting, no right to inherit from him is thereby conferred on the child, though the latter has complied with the terms of such articles during the full period of his minority.

Appeal from Wapello Circuit Court.

WEDNESDAY, OCTOBER 5.

THIS is an action for the partition of certain real estate. The plaintiffs are husband and wife. The plaintiff Emma Shearer claims that she, as the heir of John P. Weaver, is entitled to two-thirds of said real estate, and that Nancy Weaver, as the widow of John P. Weaver, is entitled to the remaining one-third of said estate. The defendant J. P. Hawthorn claims that he, as the grantee of Isaac Weaver, is the owner of one-third of the land described. The cause was referred to I. N. Mast Esq., who reported the facts, and recommended that one-third part of the lands be set apart to Emma Shearer, Nancy Weaver and J. P. Hawthorn respectively. Upon the facts reported the court disregarded the recommendation of the referee and set apart two-thirds of the

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land to Emma Shearer, and one-third to Nancy Weaver. The defendant Hawthorn appeals. The facts are fully set forth in the report of the referee.

W. W. Cory, H. H. Trimble and M. J. Williams, for appellant.

Stiles & Lathrop, for appellees.

DAY, J.—The referee filed a report as follows: “1st. That on the 30th day of July, 1875, John P. Weaver died intestate, seized in fee of the following described real estate, to-wit: The $E\frac{1}{2}$ of the $NE\frac{1}{4}$ of section No. 33, and 60 acres off of the south part of the $NW\frac{1}{4}$ of section No. 34, all in township No. 73, range No. 12 west. Also the N twelve acres of the $NE\frac{1}{4}$ of the $NW\frac{1}{4}$ of section No. 5, township No. 72, range No. 12 west; all in Wapello county, Iowa.

“2d. That John P. Weaver left surviving him Nancy Weaver, his wife, the defendant herein.

“3rd. That he also left surviving him the plaintiff Emma Shearer, intermarried with plaintiff John Shearer; that said Emma Shearer is the same person named or referred to in the adoption papers as Barbara M. Broherd and a change of name as Emma Weaver.

“4th. That plaintiff Emma Shearer claimed an interest in said lands as heir of John P. Weaver, by virtue of the adoption paper referred to in the third finding of fact; that said adoption paper was filed for record July 17th, 1858, in the office of the recorder of deeds of Wapello county, Iowa, and was entered of record in deed record K, at page 343, and that said adoption paper was indexed as, and in the name of, Tabitha Broherd, grantor, and John P. Weaver, grantee, and was not indexed in the name of the parent by adoption as grantor and the child as grantee, and that the original name of the child is stated in the adoption paper.

“5th. That said Emma Shearer began to live with, and reside in, the family of the said decedent, John P. Weaver,

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when she was about four years old, and continued to reside in said family for about eighteen years, and until her marriage with her husband, J. W. Shearer; that she was about seven years old at the time the adoption papers were executed.

"6th. That John P. Weaver also left surviving him one Isaac Weaver, who claims an interest in said lands and who conveyed whatever interest he had therein to the defendant J. P. Hawthorn, by two deeds dated respectively March 5th. 1877, and April 3d, 1877, and recorded at page 310 of deed record No. 13, of Wapello county records, and at page 456 of same record.

"7th. That said Isaac Weaver began to live with, and reside in, the family of John P. Weaver when he was about three years old and continuously resided in said family until after the death of said John P. Weaver and until after said Isaac Weaver had attained his majority; that during the time he so lived with said John P. Weaver he was obedient to the commands of said John P. Weaver and his wife, Nancy Weaver, was industrious and faithful in the discharge of all the duties that were assigned to him.

"8th. That said Isaac Weaver is the son of Mark Mann and Susannah Mann; that about the year 1859 John P. Weaver took the child to live with him on trial and to see if he would like him; that after he had resided for a brief period with said Weaver, a contract was entered into between said John P. Weaver and Mark Mann, the father of the child, in substance as follows: Said John P. Weaver agreed that he would take and keep the said child as his own child; that he would make him an heir, and that he should have an equal share with Emma Weaver (now Emma Shearer), the daughter, in his property.

"9th. That this same contract in substance was renewed and reaffirmed about the year 1864 by and between said John P. Weaver and Mark Mann; that from 1859 to this time the said child had continuously resided with said Weaver and was then residing with him.

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"10th. That on December 6th, 1872, an adoption paper was executed as shown by exhibit "B" to the referee's record of evidence, herewith filed; that said adoption paper was filed for record with the recorder of deeds of Wapello county, Iowa, August 28th, 1875, and was recorded in book 12, page 49, of the records of deeds; that it was refiled for record, in the same office, July 10th, 1877, and recorded in book 14, page 177, of the deed record of Wapello county, Iowa.

"11th. That from the time said agreement between Mark Mann and John P. Weaver was made, in 1859, to the present time said Isaac Weaver has been treated by said John P. Weaver and his wife, Nancy Weaver, as a son—as a child; that the administratrix of the estate of said John P. Weaver reported him as an adopted son, and that he was so known and considered generally in the neighborhood where Mr. John P. Weaver resided.

"12th. That defendant J. P. Hawthorn purchased from said Isaac Weaver the interest in the land in controversy in good faith, believing him to be an adopted son of said John P. Weaver, but without any further investigation than the neighborhood report and understanding.

"13th. That after the execution of the adoption paper (exhibit "B" to the evidence as reported) it was placed in John P. Weaver's hands with the understanding on the part of Mark Mann and the promise on the part of John P. Weaver that said Weaver would have it recorded.

"14th. That said John P. Weaver took the following action in relation to the recording of said paper, to-wit: He placed said paper in the hands of W. P. Simmonds, a neighbor, with instructions that, when he went to Ottumwa, he should have the paper recorded; that said Simmonds failed to go to Ottumwa, on account of the season, distance, etc., and did not have the paper recorded, but returned it to said Weaver; that this effort toward recording occurred in the latter part of 1872, or in the early part of the year 1873.

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"15th. That Isaac Weaver in so far as he could do so acted in conformity with the contract made for him by his father, and believed himself to be an adopted child of said Weaver and remained in said family under that belief for some time after attaining his majority.

"My conclusions of law therefore are: That in the issues referred—joined between plaintiff and defendant J. P. Hawthorn—the equities are with the said defendant Hawthorn; that he is entitled to the undivided one-third of the real property described and that a decree should be entered confirming the title therein in him.

"That a decree should be returned confirming the title to the undivided one-third of said land in the plaintiff Emma Shearer, and the undivided one-third in the defendant Nancy Weaver, protecting her homestead rights, as prayed, and ordering partition to be made accordingly and appointing referee therefor."

The articles of adoption of Isaac W. Weaver, referred to in the referee's report, are signed by John P. Weaver, Nancy Weaver, Mark Mann, and Susannah Mann, and are in due form. The certificates of acknowledgment thereto are as follows:

STATE OF IOWA, }
 WAPELLO COUNTY. }

On this 6th day December, 1872, before me, John Potter, a notary public in and for said county, personally came to me the above named parties and acknowledged the same to be their voluntary act and deed for the purpose therein expressed.

JOHN POTTER,
Notary Public.

STATE OF IOWA, }
 WAPELLO COUNTY. } ss.

On this 6th day of December, 1872, before me, W. H. Williams, a justice of the peace of Compentine township, in and for said county, personally came John P. Weaver and Nancy Weaver, who are personally known to me to be the

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identical persons whose names are affixed to the within instrument and acknowledged the same to be their voluntary act and deed for the purposes therein specified.

Given under my hand this the day and date first above written.

W. H. WILLIAMS,

Justice of the Peace.

These articles were filed for record and recorded August 28, 1875, and re-recorded July 10, 1877.

The plaintiff filed exceptions to the admission of parol evidence of an agreement between J. P. Weaver and the father of Isaac Weaver; and also to the conclusion of law found by the referee. The court set aside the referee's report and found that defendant J. P. Hawthorn had no right or title in said real estate; that the articles of adoption under which his grantor, Isaac Weaver, claimed as heir of said J. P. Weaver were invalid and of no effect, because not executed as required by law, and not sufficient to constitute him an heir of John P. Weaver, deceased, and that he is not entitled to claim as heir by virtue of the agreement referred to in the pleadings.

I. John P. Weaver died on the 30th day of July, 1875. The adoption paper was not filed for record until the 28th day of August, 1875. In *Tyler et al. v. Reynolds*, 53 Iowa, 146, it was held that where the instrument for the adoption of a child was not filed for record until after the death of the adopting party, the adoption was incomplete, and the child could not inherit as an heir of the decedent. Under this determination it becomes unnecessary that we should consider the claimed defect in the acknowledgment of the instrument of adoption.

II. It is claimed, however, that no matter how defective the adoption is, it is binding upon John P. Weaver, and his heirs, because it had been fully and completely complied with by Isaac Weaver, and by his father and mother. In support of this position appellant cites and relies upon *Multhby v. Harwood and Wells*, 12 Barbour, 473, and *Davies*

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v. Lenton, 13 Wis., 185. In *Maltby v. Harwood and Wells* it was held that where a minor, indentured as an apprentice, serves his master in that capacity until it is discovered by the master, before the termination of the apprenticeship, that the indentures are void by reason of their not having been executed by the minor's father, and the apprentice is therefore discharged, the master is not liable, either to him or to his father, on any implied promise to make compensation for the services so rendered; and that although a contract of apprenticeship be void, yet while the parties reside together, mutually performing the conditions of that contract, the relation of master and servant exists as really as if the indenture was binding, and upon the termination of the relation, neither party can have any claim upon the other beyond the conditions of the contract. In *Davies v. Lenton* it was simply held that an infant who agreed with an adult to serve him three years as an apprentice, for a stipulated price, may, after performing the service, maintain an action against the adult upon the contract, to recover the price stipulated, and that the adult is bound to pay for the service according to the contract, although it was not binding upon the infant, for want of conformity to the statute concerning masters and apprentices. These cases do not involve any question relating to the inheritance of real estate, and it is evident that they have but little, if any, application to the question now under consideration. The title of the appellant, J. P. Hawthorn, to an interest in the land in controversy can be upheld only upon the ground that his grantor inherited the interest conveyed. Our statute makes full and explicit provision as to the descent of property, and prescribes the persons who may take by descent. The rights of inheritance existing between parent and child by lawful birth are by statute conferred upon parent and child by adoption. Code, section 2310. In our opinion rights of inheritance cannot be conferred by a parol agreement. The case of *Van Dyno v. Vineland*, 3 Stock., 370; same case, 12 N. J. Eq., 142,

The State v. McCormack.

referred to in *Tyler v. Reynolds*, 53 Iowa, 146, is a *nisi prius* case. Besides, this case was decided in 1858, whilst the first New Jersey statute providing a mode for the adoption of children was, so far as we have been able to discover, enacted in 1877. Our statute having provided specifically the means whereby one sustaining no blood relation to an intestate may inherit his property, the rights of inheritance must be acquired in that manner, and can be acquired in no other way. The judgment of the court below is

AFFIRMED.

THE STATE V. MCCORMACK.

1. **Criminal Law:** INDICTMENT: CHARGING TWO OFFENSES. The crimes of forgery and of uttering forged paper are distinct and separate offenses and cannot both be charged in one indictment. *The State v. Nichols*, 38 Iowa, 110, overruled.

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Appeal from Clarke District Court.

WEDNESDAY, OCTOBER 5.

THERE are two counts in the indictment. The first charges that the defendant did feloniously, and with intent to defraud, falsely make, forge, and counterfeit a certain check, purporting to be signed by D. H. Porter, and the second that the defendant, with intent to defraud, uttered and published as true the check aforesaid.

The defendant demurred to the indictment, which was overruled. Whereupon he moved the court to require the State to elect upon which count the defendant should be tried, which was also overruled.

There was a trial by jury, verdict guilty, and judgment. The defendant appeals.

W. M. Wilson and Copenheffer & Demming, for appellant.

Smith McPherson, Attorney General, for the State.

SEEVERS, J.—It is provided by statute: “The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and if it may have been committed in different modes and by different means the indictment may allege the modes and means in the alternative * * * ” Code, § 4300. It makes no difference under the statute whether the offenses are charged in the same or different counts. For if more than one offense is charged the indictment is bad.

We have had occasion to construe this statute several times. See *The State v. Fidment*, 35 Iowa, 541; *State v. Rhodes*, 48 Id., 702; *The Same v. Ridley & Johnson*, Id., 370.; *State v. McFarland*, 49 Id., 99; *State v. Thomas*, 53 Id., 214.

The question for determination is whether the indictment charges more than one offense. The Attorney General does not in terms claim but a single offense is charged; but he insists this court has held that forgery, and uttering and publishing as true the forged instrument, may be charged in the same indictment. In support of this proposition the *State v. McPherson*, 9 Iowa, 53; *State v. Farr*, June Term, 1874, and *State v. Nichols*, 38 Iowa, 110, are cited.

The indictment in the last case is precisely like the one before us and both are based on the same statutes. It was held to be sufficient under the authority of the two other cases cited, under the supposition all were alike and we were bound by the former decisions. We are now constrained to say the assumption there was no difference between the two first and the last case was a mistake.

The indictment in the *State v. McPherson* was found un-

der § 5634 and 5635 of the Code of 1851, which are identical with sections 3925 and 3926 of the Code. There were three counts in the indictment. "The first was for counterfeiting silver coin * *; the second for having in possession at the same time five pieces of false coin, knowing the same to be false, with intent to utter and pass, and the third for having less than five pieces of such coin with the same intent." The court said: "A defendant cannot be charged with two distinct offenses in a single count of an indictment;" but that the indictment is sufficient "where several counts are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially the same offense." And it was held that a charge of counterfeiting coin and having the same in possession with intent to utter did not constitute two distinct offenses, and therefore could be well united in the same indictment. This case does not meet the requirements of the one before us, because in the present case there is the charge the defendant uttered and published as true the forged instrument. It seems to us this is a different and distinct offense, and that it is not included in the crime of forgery. Both are defined and punished under different sections of the Code, and in a statutory sense the uttering is the greater offense, the punishment therefor being imprisonment in the penitentiary not exceeding fifteen years, and a fine not exceeding one thousand dollars. Code, § 3918. For forgery the punishment is imprisonment not exceeding ten years. Code, § 3917.

The *State v. Farr* follows the *McPherson* case, the indictment being in substance and legal effect the same. And the uttering is a distinct, additional and independent fact not essential to be established to obtain a conviction for uttering to establish the defendant is guilty of forgery. We think the offenses are distinct, independent, and cannot, under the statute, be united in the same indictment.

REVERSED.

THE STATE V. HOLMES.

1. **Court: ADJOURNMENT BY TELEGRAPH: LEGALITY OF.** A telegram from the judge to the clerk, ordering an adjournment of court, is a written order within the meaning of the statute, and an adjournment made in pursuance thereof is legal.
2. **Criminal Law: PROOF OF FORMER CONVICTION: LIKE OFFENSE.** Upon the trial of an indictment for keeping a house of ill fame, found under section 4013 of the Code, proof of a prior conviction of the defendant on an indictment based on section 4091, but which did not charge the keeping of a house of ill fame, was held inadmissible to establish a former conviction for a like offense for the purpose of increasing the penalty under the statute.

Appeal from Winneshiek District Court.

WEDNESDAY, OCTOBER 5.

INDICTMENT charging that the defendant "did * * * keep a house of ill fame resorted to by divers persons for the purpose of prostitution and lewdness" and that the defendant had previously been convicted of a "like offense * * * to wit, keeping a house of ill-fame resorted to for the purpose of prostitution and lewdness."

There was a jury trial, verdict guilty, and that the defendant had been previously convicted of a like offense. Judgment that the defendant be "confined in the additional penitentiary at Anamosa for the term of two years and six months." The defendant appeals.

John B. Kaye, for appellant.

Smith McPherson, Attorney General, for the State.

SEEVERS, J.—I. The defendant was tried and convicted at the March term, 1881. The court should have convened on the seventh day of that month, but as the judge did not arrive at the county seat on that day the clerk adjourned the court until the next day and

1. COURT: ad-
journment
by telegraph:
legality of.

The State v. Holmes.

on that day for the same reason until the ninth day of March. At three and a-half o'clock P.M. of said last day the clerk received from the judge the following telegram:

"CALMAR, IOWA, MARCH 9TH, 1881.

"*To M. M. Harden, Clerk*—I have made and sent you a written order adjourning court until to-morrow morning, nine o'clock. Adjourn it accordingly.

"E. E. COOLEY, *Judge.*"

A few minutes before five o'clock P.M. of said day the clerk adjourned the court until March 10th, at 9 o'clock, A.M. At a quarter past six o'clock P.M. of March 9th the clerk received by mail the following: "Owing to the inability of the undersigned to reach the county seat in time to open court to-day, it is therefore hereby ordered that the District Court for Winneshiek county be and the same is hereby adjourned until Thursday, the 10th day of March, 1881, at 9 o'clock A. M. Dated March 9, 1881.

"E. E. COOLEY, *Judge District Court, 10th Judicial District, Iowa.*"

The defendant objected to being tried at said term because the court at five o'clock P. M. of March 9th by operation of law stood adjourned until the next term and could not legally convene on the 10th day of March. The objection was overruled. The statute provides: "If the judge does not appear on the day appointed for holding court the clerk shall make an entry thereof on his record and adjourn the court until the next day, and so on until the third day. * * * If the judge does not appear by five o'clock of the third day * * * the court shall stand adjourned till the next regular term. If the judge is sick or for any other sufficient cause is unable to attend court at the regularly appointed time he may by a written order direct an adjournment to a particular day therein specified, and the clerk shall on the first day of the term, or as soon thereafter as he receives the order, adjourn the court as therein directed." Code, §§ 167, 168, 169.

As the order sent by mail was not received by the clerk

The State v. Holmes.

until after five o'clock P.M. of the 9th day of March it will be conceded it cannot have any bearing on the question to be determined. The only question, then, is whether the telegram is a written order as contemplated by the statute, and its sufficiency.

Contracts may be made by telegram even where it is required they must be in writing, and it has been said it makes no difference if the writing is done with a steel pen an inch long attached to an ordinary penholder or whether the pen be a copper wire one thousand miles long. *Hopley v. Whipple*, 48 N. H., 487; *Moor v. Wood*, 36 N. Y., 307. The telegraph operator was the agent of the judge, and by means of the wire and instruments attached thereto and the operator the judge wrote the telegram which was delivered to the clerk. We think it was a written order within the meaning of the statute.

It is, however, insisted the telegram was a mere notification to the clerk that a written order had been sent to him. But we think it more than this, for the clerk was directed to adjourn the court to a time fixed and made certain by the telegram. It is, therefore, sufficient.

II. For the purpose of showing the defendant had been previously convicted of a like offense the State, against the objection of the defendant, introduced in evidence an indictment and the record showing she had been convicted thereunder. This indictment charged the defendant with "keeping a nuisance committed as follows": For that the defendant and another person "kept a certain place, a building * * * where they allow certain idle, dissolute and disorderly persons of both sexes * * * to congregate * * * for the purpose of there indulging in unlawful commerce of and between these defendants and said * * * persons and when so congregated said defendants * * * allow, permit and encourage such * * * persons to congregate for the purpose aforesaid and allow and permit * * * said persons while so congregated to so in-

2. CRIMINAL
LAW : proof
of former con-
viction : like
offense.

The State v. Holmes.

dulge in disorderly conduct and to have sexual connection and commerce in such building or place of and with them, the said" defendants, "to the great scandal and evil example of all good citizens." This indictment was probably found under Code, § 4091, which provides: "Houses of ill-fame kept for the purpose of prostitution and lewdness * * * to the disturbance of others are nuisances and may be abated and punished as provided in this chapter."

The indictment in the present case was found under the following statute: "If any person keep a house of ill-fame resorted to for the purpose of prostitution or lewdness he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars; and any person who, after having once been convicted of such offense is again convicted of the like offense shall be punished by imprisonment in the penitentiary not less than one year nor more than three years." Code, § 4013. There can be no doubt, we think, that the previous conviction must have been for "keeping a house of ill-fame resorted to for the purpose of prostitution and lewdness" before the additional penalty can be inflicted.

That the offenses described in Code, § 4013 and § 4091 are not the same but different was held in *The State v. Shaw*, 35 Iowa, 575; *The State v. Alderman*, 40 Id., 375; *The State v. Odell*, 42 Id., 75.

The indictment introduced in evidence contains superfluous allegations and whether it charged the offense described in Code, § 4091, we need not determine. It being entirely clear, we think, it does not charge the offense defined in Code, § 4013, for it does not charge that the building or place where said persons were allowed to congregate was a house of ill-fame. It does not follow from what is stated it was a house of this character. We therefore think the court erred in permitting said indictment and record of conviction to be introduced in evidence, and in sentencing the defendant to be imprisoned in the penitentiary.

REVERSED.

Beldman v. Goodell.

BEIDMAN V. GOODELL ET AL.

1. **Principal and Agent: RATIFICATION OF UNAUTHORIZED CONTRACT.**

A principal who accepts the benefit of an unauthorized contract made by his agent must take also the obligations which form a part of it.

2. —: —: **RULE APPLIED.** An agent for the owner of a note and mortgage took new notes for the debt, and in consideration of their being signed by the wife of the maker, who was not a party to the former note, agreed to cancel the mortgage. His principal having brought suit and taken judgment against both husband and wife on the notes, it was held that he could not also enforce the mortgage.

Appeal from Van Buren Circuit Court.

WEDNESDAY, OCTOBER 5.

ACTION to foreclose a mortgage executed by the defendants J. G. and Abigail O. Goodell. The defendants do not deny the indebtedness, but resist the foreclosure of the mortgage, alleging that the plaintiff for a valuable consideration agreed to release the mortgage.

The original indebtedness was due to one Swazy. For this indebtedness J. G. Goodell executed his promissory note, and to secure it he executed the mortgage in suit, A. O. Goodell, his wife, joining with him in the mortgage. Afterward the note was sold and transferred to the plaintiff, Beidman. It not being paid when due, and some interest being delinquent, the plaintiff desired to have the note renewed, and a note given for the interest. Two notes were accordingly given, that for the principal being payable one day after date, and that for the interest being payable on demand. The new notes were signed not only by J. G. Goodell, the maker of the original note, but by his wife also, A. O. Goodell, who had not signed the original note. They aver that in consideration of Mrs. Goodell's signature to the new notes the plaintiff agreed to release the mortgage. The transaction in which the old note was surrendered to J. G. Goodell and the new

Beldman v. Goodell.

notes were taken was conducted on the part of the plaintiff by an attorney, one Henry Benson. Whatever agreement, if any, was made for a release of the mortgage was made by Benson. The mortgaged land has been conveyed by the mortgagors to their son, Flagg Goodell. He joins with them in resisting the foreclosure, setting up the alleged release. The court rendered judgment for the amount of the notes against J. G. and A. O. Goodell, and denied the foreclosure. The plaintiff appeals.

G. W. Ringer and Work & Brown, for appellant.

Knapp & Beaman and Henry Benson, for appellees.

ADAMS, CH. J.—Whether Benson was authorized to agree to a release of the mortgage is one of the questions in dispute. There is no evidence that he was unless Benson's testimony may be regarded as such evidence. While he says that he has no remembrance of being authorized to agree to such release, yet he says that if he told Mrs. Goodell that the mortgage was to be released then he was authorized to say so. He was first asked if he would have made an unauthorized statement to induce Mrs. Goodell to sign the notes, to which he replied that that was not his way of doing business. His testimony then as to his authorization is based simply upon this theory, and not upon any remembrance of the fact.

The plaintiff's testimony was taken by deposition, and he does not appear to have been asked any question directly upon this point. But he shows that he was greatly disturbed as to the effect of taking new notes, lest that in law the mortgage should be held to be released. The plain inference from his testimony is that he never intended to release the mortgage in any way.

If we regarded the case as turning upon the question of Benson's authority to agree to a release we might feel con-

 Beldman v. Goodell.

strained to hold for the plaintiff. But in the view which we have taken of the case that question is not material. The fact that Benson agreed to such release is proven beyond any reasonable doubt. It is equally clear that the agreement constituted the inducement to Mrs. Goodell to sign the notes. The defendants insist that if the agreement was not authorized by the plaintiff it was at least subsequently ratified by him, and in this we think that their position is well taken.

It appears to us that the plaintiff should not be allowed to receive the notes with Mrs. Goodell's signature, and enforce them against her by judgment, without being held to have adopted the whole contract by which her signature was obtained. Where a contract is an entirety and is wholly unauthorized, and the principal takes the benefit of it, he must take it with the obligations which make a part of it. *Horil v. Pack*, 7 East., 164; *Cornwall v. Wilson*, 1 Ves., 509; *Farmers' Loan and Trust Co. v. Walworth*, 1 Comst., 433; *Hovey v. Blanchard*, 13 N. H., 145. We do not say that the mere acceptance of the notes by the plaintiff would have bound him to release the mortgage, if at the time of such acceptance he had no knowledge of the agreement to release the mortgage. If the defendants, relying upon a ratification of Benson's unauthorized agreement for such release, had brought an action to enforce the agreement we are inclined to think that they would have failed without proof that the acts relied upon as a ratification were done with knowledge of the agreement. But in such case if it had appeared that the notes were accepted without knowledge of the agreement it might still have been necessary, in order to escape the binding effect of the agreement, to make a prompt offer to release Mrs. Goodell from the notes, after obtaining knowledge of the agreement.

But this action was brought to enforce the notes, and was prosecuted to judgment as well against Mrs. Goodell as against her husband, and that, too, notwithstanding the averments

The State v. Leighton.

and proofs of the agreement by reason of which Mrs. Goodell's signature was obtained. In our opinion the agreement was ratified by the plaintiff and the judgment must be

AFFIRMED.

THE STATE V. LEIGHTON.

1. **Criminal Law: INDICTMENT: ROBBERY.** A charge in an indictment for robbery that the defendant did, with force, etc., steal, take, and carry away from another certain property, is not equivalent to charging that it was taken from his person, and is insufficient.

Appeal from Lee District Court.

WEDNESDAY, OCTOBER 5.

THE defendant was convicted of the crime of robbery, alleged to have been committed upon Isaac Mendenhall. Judgment having been rendered upon the verdict he appeals.

Geo. F. Hilton and O. B. Hillis, for appellant.

Smith McPherson, Attorney General, for the State.

ADAMS, CH. J.—The question presented is in relation to the sufficiency of the indictment. It was raised by motion in arrest of judgment. The ground of the motion as stated was that “the indictment does not charge the crime of robbery in that it does not aver the taking to be from the person of another.” The averment is that the defendant, with force, etc., and by putting in fear, etc., “did take, steal, and carry away from the said Isaac Mendenhall.” It is contended by the appellant that the indictment in order to charge the crime of robbery committed upon Mendenhall should have charged a taking from the *person* of Mendenhall, and not merely a taking from him. He bases his position

1. CRIMINAL
LAW: indictment: robbery.

The State v. Leighton.

upon the language of the statute, Code, section 3858, which provides that "if any person with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery."

The Attorney General contends that the charge as contained in the indictment would, to a person of ordinary understanding, mean a taking from the person, or if not it would mean a taking from his *immediate presence*, which he says is sufficient at common law, and so must be regarded as sufficient under our statute. In support of his view as to the meaning of the indictment, he insists that it necessarily charges something more than larceny, which is a mere taking of the property of another, and the argument is that if the indictment charges a crime other than larceny by reason of charging a taking *from* another, instead of charging a taking of the property of another, the crime charged must be robbery.

But in our opinion the language used lacks that certainty which is required in an indictment. While it is true that a taking of property from the person of another or from his immediate presence is a taking from him, yet it is also true that any taking of the property of another is a *taking from him* within the meaning of those words. *Taking from* does not necessarily mean more than mere deprivation.

The precise question involved arose in *People v. Beck*, 21 Cal., 386, and the indictment was held bad.

We think that the motion in arrest should have been sustained.

REVERSED.

WALTON V. MANDEVILLE, DOWLING & CO.

1. **Statute of Frauds:** ACCEPTANCE: WHEN VALID IN PAROL. A verbal acceptance of an order is valid and enforceable only where the drawee has funds of the drawer in his hands, so that by payment of the order he satisfies his own debt.

56	597
84	661
56	597
106	180
56	597
110	376

Appeal from Mahaska Circuit Court.

WEDNESDAY, OCTOBER 5.

THE plaintiff is a creditor of Harry Smith & Co., to the amount of \$1,024.93. He brings this action to recover his claim from the defendants. His alleged right of action as against them is based upon two grounds: 1st, a general verbal promise to pay the same; 2d, a verbal acceptance of an order for that amount.

The defendants pleaded a general denial, the statute of frauds, and want of consideration. There was a trial by jury, and a verdict and judgment were rendered for the plaintiff. The defendants appeal.

John F. Lacey, for appellants.

Crookham & Gleason and *Lafferty & Johnson*, for appellee.

ADAMS, CH. J.—Harry Smith & Co. were subcontractors upon a railroad. They became indebted to the plaintiff by

reason of the assumption of certain indebtedness due to plaintiff from their laborers. For the purpose of paying such indebtedness they drew an order in the plaintiff's favor upon the defendants, who were contractors upon the railroad and under whom the drawers were subcontractors. The order is in these words:

"Mandeville, Dowling & Co.:—Pay to John W. Walton the sum of \$1,024.93, and charge the same to the estimate of Harry Smith & Co."

Walton v. Mandeville, Dowling & Co.

The jury found specially in answer to special interrogatories as follows:

"1st. 'Do you find that the defendants made a parol promise to pay the debt of Harry Smith, or Smith & Co?'
Ans. 'Yes; of Harry Smith, to amount of \$1,056.'

"4th. 'Was said promise on condition that there should be anything due H. Smith & Co. after the expense of the work was paid for?' Ans. 'No.'

"5th. 'Was the order accepted on condition that if there was any surplus after paying the expense of the work and a previous order of \$232 to one Clarke, that surplus should be paid to plaintiff?' Ans. 'No.'"

The evidence shows clearly that there was nothing due from the defendants to H. Smith & Co. The promise relied upon as made by the defendants to pay the debt of H. Smith & Co. was not binding for want of consideration if for no other reason. *Ayres v. C., R. I. & P. R. Co.*, 52 Iowa, 478.

The plaintiff, however, insists that the defendants are bound by the acceptance of the order, though the same is verbal and without consideration moving to them.

The defendants deny that there was any acceptance.

The jury did not specially find that there was. They find a mere promise to pay the debt of Harry Smith; but that was for an amount somewhat greater than the order; and the verdict, we think, must have been based upon such promise, because the order was not large enough to justify the verdict rendered.

Again the promise, whatever it was, appears to have been made by an agent of the defendants, and it is insisted by the defendants that the promise, if made, would not bind them. They go further and insist that even one of the partners could not have bound the firm by such a promise in the absence of funds of Harry Smith & Co. in their hands.

These questions have been discussed by appellants' counsel, but the case is now before us upon rehearing, and in granting the rehearing we called for arguments merely upon the ques-

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tion of the validity of the verbal acceptance of an order where there are no funds of the drawer in the hands of the acceptor. We could not, we think, properly go into the consideration of the other questions without calling for an argument from the counsel for the appellee, and as we have reached a conclusion adverse to him upon the question upon which arguments were called for, it is unnecessary to consider any other question.

In the opinion originally filed it was held that the verbal acceptance of an order is valid notwithstanding there may be no funds of the drawer in the hands of the acceptor. Upon the rehearing several authorities have been cited to which our attention was not called, and some which had been cited we have been able to give a more careful examination than we did before, and we have to say that we have reached a different conclusion.

The validity of the verbal acceptance of an order has been sustained in several cases. . Quite a number were cited in our original opinion, and it must be said in none of them did it appear that a distinction had been recognized between cases where there have been funds of the drawer in the hands of the acceptor and where there have not. The general way in which the rule was stated led us to believe that the distinction had not been deemed material. In *Daniel on Negotiable Instruments*, Sec. 566, the opinion is expressed that the distinction is not material. This opinion is based in part upon the unqualified language used in the decisions, and in part upon what are supposed to be the demands of commercial paper.

On the other hand it is said in *Browne on Frauds*, 174: "There seems to be no sound reason why a verbal acceptance or promise to accept for the mere accommodation of the drawer, and without value received, should not be treated as within the statute." In *Robinson's Practice*, 2 Vol., 152, it is said: "The parol acceptance being no more than a parol promise it seems to the author that whether or not the acceptor can be charged on such promise may depend upon whether the prom-

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ise is to pay a debt of his own or to answer for the debt of another; for in the latter case no action can be lawfully brought unless the promise or memorandum or some note thereof be in writing and signed by the party to be charged thereby or by his agent." In *Quin v. Hanford*, 1 Hill (N. Y.), 84, the defendant was treasurer of a corporation. An order was drawn upon him for a debt of the corporation which he agreed to pay. It was held that in the absence of funds of the corporation in his hands he was not liable. That a verbal acceptance in the absence of funds of the drawer in the hands of the acceptor is not valid was held in *Pike v. Irwin*, 1 Sand. (N. Y.), 14, and *Manly v. Goeagan*, 105 Mass., 445. That a verbal promise to accept in the absence of such funds is not valid was held in *Plummer v. Lyman*, 49 Me., 229, and *Wakefield v. Greenhood*, 29 Cal., 600. We have become satisfied that the doctrine of these cases is correct.

As opposed to them we find but little except the statement of one or two text writers, based, as it seems to us almost wholly if not entirely upon mere inference or dicta or adjudications not precisely in point.

The plaintiff's argument is that a verbal acceptance is equivalent to a written acceptance; that the validity of a written acceptance does not depend upon the existence of funds of the drawer in the hands of the acceptor, therefore the validity of a verbal acceptance does not.

But we cannot accept this reasoning as sound. It is true that no consideration is necessary to bind an acceptor who has become such by written acceptance. But then he becomes a party to the paper. His liability we apprehend rests strictly upon this ground. An acceptor by verbal acceptance does not become a party to the paper; certainly not in any such sense as he would by written acceptance.

A verbal promise to pay the debt of another can be enforced where the promisor by the payment would pay his own debt as well as of the person in whose behalf the promise was made. And such is precisely the case where there is a verbal accept-

The Singer Manufacturing Company v. Littler.

ance of an order by a person who has funds of the drawer. Indeed it is not necessary that the request should be made in writing. If A, having funds belonging to B promises C, at B's verbal request to pay C from such funds a debt due him from B, A is holden. This doctrine is elementary. The validity of a verbal acceptance of an order must, we think, rest upon the same ground. We see no other.

The view which we have expressed appears to us to be the only safe view, and the only one which can be sustained upon principle.

The defendants have been adjudged to pay another person's debt, in the absence of any consideration, upon an alleged verbal promise of their agent, such promise being expressly denied by the agent, and proven by no evidence except the testimony of the plaintiff, and that of a very weak and unsatisfactory character.

We are unwilling to sanction a rule which shall make a recovery possible in such a case.

Finding no evidence to justify a recovery under what we deem the correct rule, the judgment must be

REVERSED.

THE SINGER MANUFACTURING COMPANY V. LITTLE ET AL.

1. **Guaranty: WHEN A CONTINUING OBLIGATION: NOTICE.** The guarantors of a contract which may be terminated at the pleasure of either party, and on which their liability is a continuing one and liable to be increased and diminished at different times, have a right to notice of the amount thereof within a reasonable time after the termination of the contract.
2. **—: WHO ARE GUARANTORS.** The sureties on the bond of an agent for the sale of sewing machines, conditioned that such agent will account for all money and property coming into his hands, are guarantors within the meaning of the above rule.

55	601
93	653
55	601
112	192

The Singer Manufacturing Company v. Littler.

Appeal from Wapello Circuit Court.

WEDNESDAY, OCTOBER 5.

ACTION AT LAW. The cause was tried to the court below without a jury, and judgment was rendered for defendants. Plaintiff appeals. The facts of the case appear in the opinion.

D. F. Miller and *H. B. Hendershott*, for appellants.

William McNett, for appellees.

BECK, J.—I. The action is upon a bond executed by Littler as principal, and the other defendants as sureties, conditioned that Littler shall pay to plaintiff all his indebtedness to it, existing or afterward to exist, whether upon notes, accounts, or in any other manner. The petition alleges that Littler became agent of plaintiff for the sale of sewing machines, and the bond in suit was executed, when he was appointed, to secure plaintiff from loss that might accrue on account of his employment. The petition alleges that Littler became delinquent in his payments and executed a note to plaintiff, upon which a judgment was afterward rendered, for the amount of his indebtedness.

The sureties answered the petition alleging that Littler and the plaintiff entered into an agreement whereby Littler became plaintiff's agent, and became bound to pay to plaintiff money upon the sales of sewing machines or upon the indorsement of paper taken upon such sales as stipulated in the agreement. The agreement provides that either party may terminate the contract at their pleasure. Other conditions need not be set out. •

The answer further alleges that plaintiff had terminated Littler's agency before the note was executed by him, and that the defendants had no notice at any time that Littler was in default, or that any claim was made by plaintiff against them upon the bond. Upon a demurrer to this answer the

The Singer Manufacturing Company v. Littler.

court held that the defendants were entitled to notice of the amount due from Littler within a reasonable time after the settlement between him and plaintiff. The court found upon the trial that no such notice was given to the defendants, wherefore they suffered loss, and that plaintiff, therefore, is not entitled to recover.

II. The controlling question in the case, and the only one argued by counsel, involves the correctness of the court's ruling in holding that defendants are not liable for the reason that notice was not given them of the extent of Littler's liability within a reasonable time after his agency was terminated and his indebtedness fixed by his settlement with plaintiff. The ruling of the court we think is correct, and in accord with *Davis Sewing Machine Company v. Mills et al.*, 55 Iowa, 543. We held in that case "where the guaranty is a continuing one, and the parties must have understood their liability thereunder would be increased and diminished from time to time, and the guaranty is uncertain as to when it will cease to be binding upon the guarantor, and when the party indemnified has the power at pleasure to annul and put an end to the contract guaranteed, without the knowledge of the guarantor, he is entitled to notice, within a reasonable time after the transactions guaranteed are closed, of the amount of his liability thereunder." It will be observed, upon considering the statement of the terms of the contract guaranteed as above set out, that they are within this rule, and that under it the defendants in this case are not liable in the absence of the notice contemplated therein.

III. But counsel for plaintiff in an ingenious argument attempt to distinguish this case from *Davis Sewing Machine Company v. Mills et al.* They insist that while the contract in that case was a guaranty, in this case defendants are not guarantors, but are sureties for Littler, and are jointly liable with him upon an original contract. The error of this position is apparent. Littler was, or was

1. GUARANTY:
when a con-
tinuing obli-
gation: notice.

2. —: who
are guaran-
tors.

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The Singer Manufacturing Company v. Littler.

about to become, indebted to plaintiff upon the contract under which he was appointed agent. Defendants were not bound upon that contract; neither were they bound upon the notes, accounts, acceptances, or upon any contract upon which Littler became indebted to plaintiff. They became first and only bound upon the bond, whereby they guaranteed that Littler would pay his indebtedness to plaintiff in whatever form it assumed. A guarantor becomes bound for the performance of a prior or collateral contract upon which the principal is alone indebted; a surety is bound with the principal upon the contract under which the principal's indebtedness arises. This is a familiar doctrine of the law. Upon applying it to the facts of the case it will be seen that defendants are guarantors, and not sureties, for the performance of the contract upon which Littler's indebtedness to plaintiff arose. They were therefore entitled to notice under the rule of *Davis Sewing Machine Company v. Mills et al.*

It may be observed that guarantors are often called sureties. We use the term sureties in the foregoing discussion to describe one who is bound by a contract with his principal—who joins with his principal in the execution of the contract, and becomes pecuniarily liable thereon. But, as we have seen, a guarantor, the surety in a contract of guaranty, is not primarily liable upon the principal's contracts, and only becomes liable upon his default. A guarantor under this rule is entitled to notice of the amount of his liability within a reasonable time after that liability is determined by the transaction between the original debtor and creditor. It is our opinion that the judgment of the Circuit Court ought to be

AFFIRMED.

 McMurray v. Van Gilder.

McMURRAY ET AL. V. VAN GILDER.

56	605
98	472
101	368
56	605
143	100

1. **Parties: JOINDER.** In an action in equity, where a part of the relief asked is the cancellation of a contract, one of the parties to such contract may properly join as a plaintiff.
2. **Equitable Jurisdiction: INJUNCTION: REMEDY AT LAW.** A court of equity which has acquired jurisdiction of an action for the purpose of canceling a contract may retain the case and do complete justice between the parties by injunction, though a part of the relief granted might have been obtained in an action at law.

Appeal from Lucas District Court.

WEDNESDAY, OCTOBER 5.

ACTION in chancery. There was a decree in the court below granting the relief prayed for in plaintiffs' petition. Defendant appeals. The facts of the case are stated in the petition.

Mitchell & Penick, for appellant.

J. N. McClanahan, for appellees.

BECK, J.—I. The petition alleges and the proof shows that plaintiff Mrs. McMurray rented to defendant certain lands to be cultivated in corn, for which he was to pay two-fifths of the crop as rent; that on the 5th day of November plaintiff Jackley accepted the proposition of his co-plaintiff to sell the corn, and paid part of the purchase money in the manner indicated in the proposition; namely, by paying certain notes and accounts held against McMurray; that on the same day Jackley informed defendant that he had purchased the corn; that defendant was advised by McMurray, by a letter delivered by Jackley at the time he informed defendant that he had purchased the corn, of the price and terms of the sale at which Mrs. McMurray would sell the

McMurray v. Van Gilder.

corn. On the next day the defendant sent to Mrs. McMurray the money and note corresponding with the terms of sale proposed by her, and his messenger represented that Jackley did not want the corn. Thereupon she accepted the money and note and executed a paper witnessing the sale of the corn to defendant. Subsequently, after being advised of the facts, Mrs. McMurray tendered to defendant the money and note received in payment of the corn. At the time of these transactions the corn in controversy had not been gathered; the defendant had gathered some of his part of the crop, leaving the rent corn upon the stalk.

The petition alleges that defendant is insolvent and that the value of the corn cannot be collected from him by process of law. It prays for an injunction to restrain defendant from gathering the corn; that a specific attachment be issued for the seizure of the corn, and that the contract of sale made by Mrs. McMurray be canceled and that the corn be restored or full compensation be allowed therefor. A temporary injunction and attachment as prayed for in the petition were allowed. The answer of defendant denies the allegations of the petition relating to the sale of the corn to the respective parties, and avers that defendant acquired title to the property by his purchase. Upon the final hearing the court found the title of the corn to be in Jackley, and that the sale to defendant was procured by fraud and was, therefore, declared to be void and of no effect.

II. We think the decree of the District Court has ample support in the testimony. The defendant had full and complete notice of the proposition of sale made to Jackley, of his acceptance, and of the part payment made by him. Defendant procured the sale to himself by false and fraudulent representations which his messenger made to Mrs. McMurray, to the effect that Jackley declined to accept the proposition she had sent him, when in truth defendant knew that the proposition had been accepted and payment in part made

McMurray v. Van Gilder.

thereon. The facts are sufficient justification of the decree of the court below.

III. Defendant insists that there is a misjoinder of parties, and that his motion to strike out the name of McMurray as plaintiff should have been sustained. While
 1. PARTIES: she may not be a necessary party she is a proper
 Joinder. party to the action, as it seeks to set aside a contract which she executed. She, therefore, has an interest in the subject matter of the action, and for this reason was properly joined as plaintiff. Code, § 2545.

IV. The defendant insists that plaintiffs have a complete remedy at law, and that an attachment would have been a
 1. EQUITABLE sufficient remedy to enforce the collection of the
 jurisdiction: rent. But the action seeks to set aside a contract
 injunction: remedy at
 law. of sale, fraudulently obtained by defendant, which stands in the way of the enforcement of plaintiffs' claim to the corn.

The plaintiffs were compelled to resort to the court of chancery to annul this contract, and that court, having acquired jurisdiction of the parties and the subject matter in controversy, in order to administer full equitable relief will retain the case and do complete justice though remedies that could have been sought at law are adopted and applied.

V. The defendant insists that the court below ought to have sustained his motion to dissolve the injunction. It will be readily seen that in view of the rights of plaintiffs to the corn, and the alleged insolvency of defendant, the temporary injunction was properly allowed. Under this injunction the defendant was restrained from so disposing of the property that plaintiff could not acquire its possession. The final decree declares that plaintiff, Jackley, is entitled to the corn as the owner thereof. The injunction, as it aided to secure his rights, was properly permitted to stand by the court.

VI. The defendant in his argument expressly declines to urge any objection to the action of the court in allowing and

Sherwood v. Sherwood.

refusing to dissolve the attachment; we are not, therefore, required to review these proceedings.

We have considered all questions discussed by counsel and reach the conclusion that the decree of the District Court ought to be

AFFIRMED.

SHERWOOD V. SHERWOOD.

- 1. Parent and Child: CUSTODY OF CHILD: DIVORCE.** A modification of a decree of divorce, changing the custody of the child of the parties from the mother to the father considered and approved.

Appeal from Poweshiek District Court.

TUESDAY, OCTOBER 18.

THIS action was brought originally for the purpose of obtaining a divorce, the alleged ground of divorce being that the defendant had been guilty of adultery. A decree was granted as prayed, and the custody of the only child of the parties, Myo D. Sherwood, a boy about six or seven years of age, was awarded to the plaintiff. About two years afterward the defendant filed a petition asking for a change of the decree in regard to the custody of the child, setting up among other things as ground for the application that the plaintiff had failed to exercise proper restraint over the child; that she had allowed him to stay out late at night; that she has evinced a lack of self-control, being sometimes too indulgent, and sometimes treating the child with undue severity; and that under her discipline the child was becoming a bad boy. He also averred that the plaintiff had been laboring to estrange the child from him.

The plaintiff in her answer denied the allegations of the petition. Upon the hearing the prayer of the petition was

Sherwood v. Sherwood.

granted and the decree changed, and the custody of the child was awarded to the defendant. The plaintiff appeals.

Cole & Cole, for appellant.

Brown & Binford, for appellee.

ADAMS, CH. J.—This case might perhaps be disposed of in favor of the appellee upon purely technical considerations.

1. PARENT
and child:
custody of
child: di-
vorce.

But having examined the entire case, and being agreed in our conclusions, we have to say that it is more satisfactory to us, and we doubt not it will be to both parties, to dispose of the case upon its merits.

The parties reside in the city of Marshalltown, and appear to occupy positions of considerable prominence. The defendant is a physician in successful practice, having an income of from \$2,500 to \$3,000 a year, and is regarded by his neighbors as a man of integrity. The plaintiff is the owner of a respectable house in which she resides, and where she supports herself by giving music lessons, and occasionally taking one or more boarders.

The child while residing with his mother has been in the habit of visiting his father daily, or nearly so, the respective residences of his father and mother being only about one block apart. The child has kept a trunk at his father's house and a part of his clothing in it, and has gone there frequently to dress and bathe. The father has always manifested a very commendable interest in the child's welfare; has bought clothing for him; has attended him in sickness and prescribed for him, and when the child fell behind in one of his studies in school his father furnished him a special teacher in that study. The evidence shows very clearly, we think, that the father is a suitable person to have the custody of the child.

The evidence tending to show the mother's unsuitableness is not of so marked a character. We are all agreed, however, upon a separate reading of the evidence, that according to the

Sherwood v. Sherwood.

preponderance of it, she has failed to exercise the restraint which the best interests of the child required; and what is more, as it seems to us, she has been greatly imprudent in her conversation with him, and with others in his presence, in regard to the grounds upon which she obtained the divorce, and in regard to what she claims has been the criminal conduct and disposition of the father since the divorce was obtained. We think that the allegation is fully proven that she has labored to estrange the child from his father.

Now while the question before us is far less in regard to the rights of the father than the good of the child, we can but regard the repeated accusations of criminal conduct and disposition on the part of the father, made by the mother to and in the presence of the child, as not alone derogatory to the father's rights, but as tending directly to exert a deleterious influence upon the child. He was bound to his father by ties of natural affection, and the evidence shows that that affection had been kept alive. It also shows, we think, that the father's influence upon the child was positive and salutary. Nothing was to be gained so far as we can see by destroying the child's affection and respect for him.

We ought perhaps in this connection to say that the child upon being examined as a witness testified that his father told him once in a while that his mother was a bad woman and not fit to raise him. But this general accusation, although by no means to be approved, was of less consequence than the specific accusations which it appears were made by the plaintiff. Besides, the testimony of the child may, we think, be somewhat distrusted, or taken with allowance. The child, as he testified, preferred to live with his mother, the reason given by him being that he should have more freedom with her.

We hesitate less in holding that the decree should be affirmed because of the guarded and prudent provisions which it contains. The child is not to be taken out of Marshall county without the plaintiff's consent, except upon a pleasure

Rump v. Schwartz.

trip with the father. The plaintiff is to be allowed to visit him at all reasonable times. In case of his sickness she is to be notified promptly and allowed to attend him. He is to be allowed to visit his mother, and be with her, and give her his earnings if he sees fit; and she is not to be deprived of his society, comfort or assistance except so far as it is absolutely necessary to enable the father to control and direct his education, habits and vocation in life.

The decree meets with our approval, and in view of all the circumstances of the case we think that it should meet with the plaintiff's approval also. At all events it must be

AFFIRMED.

RUMP V. SCHWARTZ ET AL.

1. **Contract: REFORMATION OF: EQUITABLE JURISDICTION.** An allegation of a mistake in a written contract, and a prayer for its correction, will not authorize the reformation of the contract in other particulars nor impair its validity as to its other provisions.
2. ———: **FORFEITURE: WAIVER OF.** Where after default in making payments under a contract for the sale of land, whereby under its terms a forfeiture was worked, the vendor enforced payment of a portion of the sum by the sale of property mortgaged as security, it was held that he thereby waived the forfeiture and could not insist thereon after a tender of the balance due under the contract.

Appeal from Lee District Court.

TUESDAY, OCTOBER 18.

Action for specific performance. Decree for the plaintiff, and defendants appeal.

Casey & Casey and Craig, Collier & Craig, for appellants.

Van Valkenberg & Hamilton, H. Lohmer and Newman & Blake, for appellee.

Rump v. Schwartz.

SEEVERS, J.—The petition states that plaintiff purchased of the defendant Catherine Schwartz the east half of the southwest quarter of section thirty-five, in township seventy-eight north, of range five west, containing eighty acres, for which he agreed to pay twenty-two hundred dollars, and gave his two promissory notes for eleven hundred dollars each, one payable August 12, 1878, with interest from March 12, 1878, and the other payable March the first, 1879, with interest from August 12, 1878. Each of said notes “having approved security thereon;” that said Catherine gave the plaintiff a bond whereby she bound herself to convey said premises to the plaintiff upon condition he paid said notes at maturity, and also paid the taxes upon said premises; that on June 20th, 1879, the plaintiff tendered said Catherine \$404.50, which was the full amount due, and demanded a deed, which said Catherine refused to execute; that the amount aforesaid was deposited in bank, and was at the “disposal of said Catherine at any time she may call for the same upon the execution” of said deed.

The bond was in the penal sum of forty-four hundred dollars, and contains the following among other provisions:

“Whereas, said Catherine Schwartz has this day agreed to sell to the said John Rump the following tract of land in Lee county, Iowa, to-wit: The east half, southwest quarter of section thirty-five (35), township sixty-eight (68) north, of range five (5) west, containing eighty acres more or less, on condition that the said John Rump shall pay the sum of two thousand and two hundred dollars in the manner following, to-wit: Eleven hundred dollars on the 12th day of August, A. D. 1878, with interest on the same at ten per cent from the 12th day of March, A. D. 1878, with approved security; eleven hundred dollars on the 1st day of March, A. D. 1879, with interest on the same at ten per cent from the 12th day of August, A. D. 1878; eleven hundred dollars on the 1st day of October, A. D. 1879, with interest on the same at ten per cent from the 12th day of November, A. D. 1878, with ap-

Rump v. Schwartz.

proved security; eleven hundred on the 1st day of July, A. D. 1880, with interest on the same at ten per cent from the 1st day of November, A. D. 1879, with approved security."

The bond further provides that the plaintiff shall pay the taxes on the land aforesaid, and the notes above described when due, and "that time is of the essence of this contract, and that in the event of the non-payment of said sums of money, or any part thereof, promptly at the time herein limited, that then the said Catherine Schwartz is absolutely discharged at law and in equity from any liability to make and execute such deed and may treat the said John Rump as a tenant."

It was averred in the petition there was a "technical error in said bond" in the reference therein made to the two last notes described; that the same related to "another and distinct transaction and ought not to have been incorporated" therein, and it was asked that the same be stricken out.

It was stated in an amended petition the first note described in the bond had been paid about the time it became due, and that to secure the second note the plaintiff executed certain chattel mortgages which were foreclosed by said Catherine, and on June 19th, 1878, she received \$601.50 as the proceeds of the mortgaged property, which should be applied as a payment on said second note; that thereby the stipulations of the bond in relation to time being of the essence of the contract were waived, and by the acts aforesaid the defendants were estopped from insisting the plaintiff was not entitled to a specific performance. Other payments on said note were alleged to have been made. Among other things the answer contained the following:

"Defendants show the truth to be that the defendant Catherine Schwartz contracted to sell to John Rump 160 acres of heavily timbered land, which the said John Rump wished to purchase for the purpose of sawing up the saw-timber thereon into lumber, building timber, railroad ties, etc., etc.; that said land is described as follows, to-wit: The

Rump v. Schwartz.

southwest quarter of section thirty-five, township sixty-eight, north, of range five, west, in Lee county, Iowa; and defendants show that said Rump was to pay for said land the sum of \$4,400, or \$1,100 for each forty acre tract. That he was to give four notes of \$1,100 each for this land, and that one of these notes was to be paid from the proceeds of the lumber, timber, ties, etc., cut and sawed from the first forty entered upon; and the second forty was not to be entered upon until the first note, which was understood to be for the first forty, was fully paid, and thus each of the three successive forty acre tracts was to be paid for from the proceeds of the timber on that forty before the next should be entered upon by plaintiff. And it was plainly and expressly understood that defendants did not wish to sell a part of said land, but all of it, and that no deed was to be made to any part thereof until all should be paid for in the time and manner provided in the contract, and until all the conditions of the contract were fulfilled, and that in case the conditions were not fulfilled that defendant Catherine Schwartz was to retain the land absolutely. And defendant says that in pursuance of this understanding and contract she executed a bond for a deed."

The defendants denied there was a technical error in the bond and denied the plaintiff had performed the contract upon his part, and it was alleged the plaintiff had failed to pay the taxes and that defendants had been compelled to do so. It was, however, admitted the first note described in the bond had been paid. It was averred in the answer the defendants had not waived the provision as to time being of the essence of the contract, or that they were estopped by anything they had done from insisting the plaintiff was not entitled to a specific performance because he had failed to make the payments as provided in the bond.

In an amendment to the petition filed after the answer the plaintiff stated "that before the maturity of the last note named in the bond the said defendant sold and delivered, by

Rump v. Schwartz.

deed in writing, the eighty acre tract not named in the bond but described in defendant's answer to one H. B. Scott, for the sum of \$2,400."

In an amended answer the defendants stated "that in the bond for a deed upon which this suit is brought there is an error in the specification in the time of payment and the time interest should begin on the third and fourth payments." The error relied on is set forth at length, and it was asked that said bond be "corrected in this regard so as to correspond with the agreement and intention of the parties."

There was a further amendment to the petition as follows:

"Now comes the plaintiff and amends his petition, and adds the further averment that he now offers to bring into court for the use of defendants any amount found due on the second \$1,100 note given for the eighty acres of land named in the bond sued on, and asks the court to determine the amount so due, and offers to pay the same and prays as in the original and amended petition."

There are other allegations in the pleadings, but we think the foregoing sufficient for a proper understanding of the questions determined.

I. It will be observed appellants do not claim there was either fraud or mistake in drafting the bond except as to the time the third and fourth payments became due and interest thereon commenced, and no affirmative relief is asked in any other respect, yet they insist the contract is not correctly stated in the written obligation and that as a correction is asked parol evidence is admissible for the purpose of showing what the contract in fact was. Conceding this to be so the contract must stand, and the rights of the parties measured thereby, except as it may have been impeached for fraud or mistake. Therefore we reject and refuse to consider all evidence contained in the record in relation to any other tract of land than that described in the bond.

L. CONTRACT:
reformation
of: equitable
jurisdiction.

II. What is the proper construction of the bond—that is,

 Rump v. Schwartz.

how much did the plaintiff agree to pay for the land therein described? That there is some doubt and uncertainty as to this must be conceded because of the contradictory provisions of the bond. Without referring to rules established with more or less unanimity in the books we think the admissions in the answer free the question under consideration of all reasonable doubt. It is therein stated the plaintiff agreed to pay eleven hundred dollars for each forty acres, thus making the amount to be paid for the land described in the bond twenty-two hundred dollars, being the amount the plaintiff claims he agreed to pay. That this is the correct amount is sustained by at least one provision of the bond, and we therefore adopt it as being the only true construction, and what the parties, we think, must have intended.

III. The first note was not paid at maturity. But by accepting the amount due after that time the defendants
 2. ——— : for- waived the provision as to time being of the es-
 : forfeiture : sence of the contract as to that payment. The
 : waiver of. second note was not paid at maturity and it may be the de-
 fendants could have insisted that according to the terms of
 the contract they were released therefrom. They did not,
 however, do so, but availed themselves of process provided by
 law to enforce the payment of the amount due on said note
 by foreclosing the chattel mortgage given as security for the
 payment of the note. From this source nearly one-half of
 the amount due was realized. At no time previous to the
 commencement of this action did the defendants declare a
 forfeiture or notify the plaintiffs they would insist on the
 provision as to time being of the essence of the contract.
 When the tender was made no such claim was insisted on,
 nor did they offer to surrender the notes. Under such cir-
 cumstances we hold the defendants waived the provision
 aforesaid and are estopped from insisting thereon. The
 plaintiff failed to pay the taxes of 1878 and the same were
 paid by the defendants on the 28th day of February, 1879.
 The chattel mortgage was not foreclosed until June, 1879

Rump v. Schwartz.

The failure to pay the taxes was waived by the foreclosure of the mortgage. The tender was made in June, 1879. The taxes for that year were not then due and the plaintiff cannot be prejudiced by a failure afterward if his tender was sufficient when made.

IV. Was the tender sufficient? The court below seems to have disregarded the allegations of the petition in this respect and from the evidence found the amount due to be less than the sum tendered. In this we think the court erred. The plaintiff in his pleadings and by his tender admitted there was due at the time the tender was made \$404.50, and for this amount, at least, the defendants were entitled to judgment.

Counsel for the plaintiff insist the tender and admissions in the petition were modified by the amended petition wherein it was stated the plaintiff was willing to pay whatever sum might be found due. No part of the petition, however, was withdrawn, nor was the amount tendered or the admissions of the answer in any respect modified. The only reasonable construction of the pleadings is that the plaintiff was willing to pay any amount found due in excess of the tender. The amount tendered was, we think, clearly sufficient.

MODIFIED AND AFFIRMED.

Byers v. Odell.

BYERS V. ODELL.

1. **Equity:** ACTION TO SET ASIDE JUDGMENT: PRACTICE. An action in equity to set aside and cancel a judgment against the plaintiff as void for want of jurisdiction cannot be maintained where the petition shows that the claim upon which the judgment was rendered was just in part, and no offer to pay such part is made.
2. **Pleading:** ACTION TO SET ASIDE JUDGMENT. A pleading attacking a judgment as excessive must state the facts relied upon to establish such claim. A general averment of excess is not sufficient.

Appeal from Wayne District Court.

TUESDAY, OCTOBER 18.

THIS is an action in equity, the object of which is to set aside a judgment and decree of foreclosure of a mortgage, and a sheriff's sale of real estate thereunder, upon the alleged ground that the judgment and decree are void for want of jurisdiction in the court in which the same were rendered. A demurrer to the petition was sustained, and plaintiff appeals.

Freeland & Miles, for appellant.*J. C. Mitchell* and *Stuart Bros.*, for appellee.

ROTHROCK, J.—I. It appears by the averments of the petition that the judgment and decree “were decided, rendered, ordered, signed and filed, in and during a vacation of said court, and not during a term (either regular or special) of said court, and that said proceedings were had and done in vacation without any agreement, consent or knowledge of this plaintiff, nor of any attorney or other person acting for the plaintiff” It is further averred that the judgment was excessive, being for \$2,057.71, whereas the total sum was but \$1,963.86. Upon these grounds it is asked that the judgment, decree and foreclosure sale be declared void.

1. EQUITY:
action to set
aside judgment:
practice.

Byers v. Odell.

By section 183 of the Code, it is provided that causes may, with the consent of the parties, be decided, and the decision entered, in vacation. Whether such proceedings in vacation, without consent of the parties, are void or are merely irregular we need not now determine. It appears from the averments of this petition that at the time the judgment and decree were rendered the plaintiff herein was justly indebted to the defendant in the sum of \$1,963.86. He makes no tender nor offer to pay this amount, nor to allow judgment and decree to be now entered for that sum. He can have no standing in a court of equity without an offer at least to do equity. *Morrison v. Hershire*, 32 Iowa, 271; *Sloan v. Coolbaugh*, 10 Id., 31. And this rule is applicable as well where the judgment from which relief is sought is void for want of jurisdiction as where it is claimed to be irregular or erroneous only. *Parsons v. Nutting et al.*, 45 Iowa, 404.

II. The averment that the judgment is excessive is too general as the basis of a claim for relief. The petition should have averred facts from which it would have appeared by computation that the amount of the judgment was in excess of the amount due on the note and mortgage. Besides, the plaintiff does not by this action seek to correct the judgment. He claims that it is wholly void. We do not determine whether or not an excessive judgment can be corrected by an original action. It would seem that a more appropriate remedy would be by motion made in the court rendering the same, or possibly by an appeal.

2. PLEADING :
action to set
aside judg-
ment.

AFFIRMED.

McCLURE V. JOHNSON.

1. **Life Insurance: PROCEEDS OF: WILL.** The proceeds of a policy of life insurance which is payable to another than the insured do not constitute assets of his estate, and cannot be disposed of by him by will.

Appeal from Jefferson Circuit Court.

WEDNESDAY, OCTOBER 19.

THE plaintiff is the executor of Nathan Johnson, and brought this action to recover of the defendant, who is the widow of said Johnson, a sum of money paid to her by the "Freemason's Protective Association of Iowa, at Keokuk." The said Johnson was a Freemason, and applied to said association to become a member and upon being accepted he agreed to "abide by all the rules and regulations adopted by the association or its official board." The association is of a benevolent and charitable character. Its object being "to secure to the families of deceased members * * such pecuniary aid as may be provided" by the association "for the purpose of assisting to defray the expenses of the funeral of such deceased members, and for the relief of their families." Every Freemason becoming a member was required to pay a stated sum when he became such. The applicant was required to state his name, age, residence and condition of his health in his application. Upon the death of a member each surviving member was required to pay to a named officer of the association one dollar and ten cents, and the association bound itself to pay a sum equal to one dollar for every member at the time of the death of a member "to the wife, husband, children, mother, sister, father or brother of such deceased member, and in the order above named."

In accordance with the foregoing, the association upon the death of said Johnson paid the money in controversy to the defendant. The said Johnson made a will which has been duly admitted to probate. It provides: "I direct that the

56	620
101	724

56	620
104	358

 McClure v. Johnson.

mortgage on my hotel property in Fairfield, Iowa, be paid out of the proceeds of an insurance policy of \$600 in the Masonic Protective Association at Keokuk, Iowa, which I hold and which is payable to me." There was a trial to the court, judgment for the defendant, and plaintiff appeals.

Slagle, Acheson & McCracken, for appellant.

Culbertson & Jones, for appellee.

SEEVERS, J.—Upon becoming a member of the association Johnson contracted with it that any money which might become due upon his death should be paid to the defendant for the purpose above stated. Upon the condition the money should be so paid the association obligated itself to pay. The contract was one of insurance and by its express terms the insurance was to be paid to the defendant if she was living at the time her husband died, and the money became payable. She alone could have maintained an action therefor. The estate of Johnson was not entitled to the money. The deceased had no interest in the money and therefore could not dispose of it by will. The statute provides: "The avails of any life insurance or other sum of money payable by any mutual aid or benevolent society upon the death of a member of such society are not subject to the debts of the deceased except by special contract or agreement, but shall in other respects be disposed of like other property left by the deceased." Code, § 2372. This statute, and also Code, § 1182, contemplate a case where the policy of insurance is payable to the deceased or his legal representative, and not where it is payable to another person for the use and benefit of such person. The case of *Kelly v. Mann, executor*, post, 625, is distinguishable. In that case the money received from the insurance company was assets belonging to the estate, and being such it was held under the statute it should be inventoried and disposed of according to law.

AFFIRMED.

FOSTER V. PAINE ET AL.

1. **Mortgage: CANCELLATION OF: POWER OF ATTORNEY.** A power of attorney which authorized an agent to cancel a mortgage on certain described real estate, and the notes secured thereby, and to take new notes and a new mortgage, of the same terms, in place thereof from another person, was held to contemplate a new mortgage on the same property, and the cancellation of the old mortgage thereunder without the taking of a new one was held to be void as against a subsequent mortgagee, who was charged by the record with notice of the terms and conditions on which the cancellation was authorized.

Appeal from Davis District Court.

WEDNESDAY, OCTOBER 19.

ACTION to foreclose a mortgage. The petition showed that in 1873 the plaintiff, James M. Foster, sold to the defendant, Jesse Fisk, certain land in Davis county; that Fisk executed to him his promissory notes for the purchase money and gave a mortgage to secure the same upon the land; that in 1876 Fisk sold and conveyed the land to the defendant, H. H. Draper, who assumed the payment of the mortgage debt; that afterwards it was arranged between the plaintiff, Draper and Fisk that the notes due plaintiff from Fisk should be taken up and that new notes executed by Draper to plaintiff should be substituted therefor, and secured by a mortgage upon the land to be executed by Draper and wife; that in pursuance of this arrangement for substitution and for the purpose of carrying out the same the plaintiff executed to one Peden a power of attorney, the power therein given being expressed in the following words: "to cancel a mortgage given by Jesse Fisk to James Foster, on the 21st day of August, 1873, on a tract of land described in said mortgage, lying in section twenty-five, township seventy north, of range thirteen, and to take up the notes which said mortgage is made subject to, and to take new notes and a new mortgage of the same terms of H. H. Draper in place thereof;" that

 Foster v. Paine.

Peden acting under the power of attorney took substituted notes; that afterward, on the 14th day of August, 1877, Draper and wife executed a mortgage upon the land to the defendant Paine, and on the same day Paine induced Peden to cause his power of attorney to be recorded and to enter cancellation of the mortgage from Fisk to plaintiff; that Peden while entering cancellation did not take a new mortgage upon the land from Draper by way of substitution, and that the cancellation was void, as the defendant well knew or should have known, because Peden was not authorized by his power of attorney to enter cancellation without taking a new mortgage upon the land from Draper by way of substitution, and so the mortgage given is still in force, and plaintiff prays for a foreclosure of the same.

To the petition so showing in substance the defendants demurred. The court overruled the demurrer as to all the defendants except Paine, and sustained it as to him. A decree having been rendered making Paine's mortgage paramount to the plaintiff's he appeals.

Trimble, Carruthers & Trimble, for appellant.

Payne & Eichelberger and *Brown & Dudley*, for appellee.

ADAMS, CH. J.—The question presented arises upon the construction which should be given to the power of attorney.

1. MORTGAGE: Was it the plaintiff's intention, as evidenced by cancellation of power of attorney. the instrument, to abandon or retain his security upon the land? If the latter the attorney had no power to cancel the old mortgage without taking a new one upon the land.

It is certain that the attorney was to take a new mortgage upon something. But no other land is indicated, even by the remotest reference, nor is the attorney vested with any power to determine the sufficiency of a new security. It cannot be supposed for a moment that the plaintiff was will-

Foster v. Paine.

ing to abandon the old security for a new one without any regard to the sufficiency of the new one. The absence, then, of any power to determine the sufficiency of a new security is a significant circumstance. If the intention had been to exchange the old security for a new one not already agreed upon, the proper and most natural way of expressing the power would be to authorize the cancellation of the old mortgage upon other and sufficient security being offered.

It is true it does not appear from the power of attorney that Draper had become the purchaser of the land covered by the old mortgage, and without being such purchaser of course he could not properly mortgage that land. It is not possible therefore to say absolutely, looking at the power of attorney alone, that the attorney was to take a mortgage from Draper upon that land. But this we may say, that the power of attorney is consistent with the supposition that Draper had purchased the land. Indeed, we think the inference would be that it was given upon that supposition. Having reached this conclusion it is safe to say that the meaning of the power of attorney is, if Draper had purchased the land, that the new mortgage was to be given upon it. With the fact of purchase conceded, what would be uncertain without it becomes reasonably certain.

The conclusion reached is strengthened by the fact that the new mortgage was to be of the "same terms" and "in place" of the old one.

In our opinion the demurrer should have been overruled as to Paine as well as the other defendants, and a decree of foreclosure entered as prayed.

REVERSED.

Kelley v. Mann.

KELLEY v. MANN.

1. **Administrator: DUTIES OF: LIFE INSURANCE.** An administrator is charged with the duty of collecting life insurance payable to the "legal representatives" of his decedent upon his death, and he and his sureties are liable for a failure to inventory and distribute the avails of such insurance paid to him.
2. —: —: —. An administrator *de bonis non*, appointed after the death of the widow of his decedent, who was his administratrix, cannot maintain an action to recover from her sureties the avails of a policy of insurance on the life of his decedent, collected by her and not accounted for, such sureties being accountable only to the children of the decedent, or their guardians, for the amount of their shares thereof.

Appeal from Des Moines Circuit Court.

WEDNESDAY, OCTOBER 19.

IN the year 1871 J. H. Latty effected an insurance upon his life in the sum of \$5,000. By the terms of the policy the amount thereof was to be paid to the "legal representatives" of the insured within ninety days after proof of his death. Latty departed this life in 1873, intestate, leaving Mary E. Latty, his widow, and two children, who were then and are now minors. Mary E. Latty was appointed administratrix of her husband's estate and gave bond for the faithful discharge of her duty as such. The whole amount secured by the policy was afterwards paid to her, for which she gave her receipt as administratrix. She died in 1878, never having made any inventory of the property received by her, neither did she at any time make any report of her doings as administratrix.

The defendant Mann was appointed administrator of her estate. The plaintiff was appointed administrator *de bonis non* of the estate of J. H. Latty, and he instituted these proceedings against Mann and the other defendants, who were sureties on the bond of Mary Latty, to recover the amount which was paid to her upon the life insurance policy.

56	625
96	338
56	625
d104	358
104	710
56	625
108	699
56	625
d124	131

 Kelley v. Mann.

The Circuit Court determined that the avails of the policy were not assets of the estate of J. H. Latty, and that therefore the defendant sureties in the administratrix's bond were not liable, and also that the plaintiff is not the proper person to maintain the action. The claim was disallowed. The plaintiff appeals.

John C. Power, for appellant.

J. & S. K. Tracy and *S. L. Glasgow*, for appellee.

ROTHROCK, J.—I. The principal question in the case is, was the policy of insurance assets of the estate of James H.

1. ADMINIS-
TRATOR: du-
ties of: life
insurance.

Latty, to be administered upon and the proceeds to be by the administratrix distributed to the parties entitled thereto under the law? If so, the administratrix and the sureties upon her bond were liable for a failure to make such distribution.

Section 1182 of the Code provides that a policy of insurance on the life of an individual shall inure to the separate use of the husband or wife and children of said individual, independently of creditors. It is urged by counsel for appellees that upon the death of James H. Latty his wife and children at once became the absolute owners of the policy of insurance, and that the collection thereof by the administratrix being without authority of law, there can be no liability for the proceeds as against the sureties in the bond. But by the provisions of section 2370 an administrator is required to inventory all the personal effects of the deceased, of every description, as well the general assets as that which is exempt, including any claim for life insurance. He is also required to cause to be appraised and set apart to the widow the personal property which would be exempt from execution. Section 2371 to section 2372 provide that "the avails of any life insurance * * * are not subject to the debts of the deceased * * * but shall in other respects be disposed of like other property left by the deceased."

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We think these sections of the statute clearly imply that the administrator is charged with the duty of collecting life insurance and distributing the "avails" to the proper parties. That a life policy is assets of the estate the same as any other chose in action cannot be seriously questioned. The only difference is in the manner of distribution. The general assets are liable for the debts of the estate, and the avails of life insurance are required to be paid to the wife and children of the intestate. Suppose after making the inventory of the specific personal property which is exempt from execution the administrator, being in possession, should refuse to deliver it to the widow, and convert it to his own use, can there be any question that such an act would be maladministration for which he and his sureties would be liable? We think not.

There is nothing in these views inconsistent with the case of *Adkinson v. Breeding*, *ante*, 26. In that case the widow took possession of certain exempt property and retained it until her death. After her death an administrator of the estate of her deceased husband was appointed, who seized the property as assets of the husband's estate. It was held that the property belonged to the estate of the wife, and that her right did not depend upon an inventory and appraisal. If an administrator of the husband's estate had been appointed during the life of the widow, and he upon making an inventory of the property had converted it to his own use, the facts would have been somewhat analogous to this case. In such case we think he would have been liable on his bond.

II. It is urged that the plaintiff cannot maintain this action as administrator *de bonis non* of James H. Latty. 2 —: —: This view appears to us to be correct. The insurance company has paid the amount of the policy to the duly appointed administratrix of the insured. She was entitled under the law to her share of the amount paid to her. The two minor children were entitled to their shares. Whatever of their shares not properly and legally

I. M. & N. P. R. Co. v. Schenck.

appropriated to their support should have been paid over to a guardian appointed for them. The amount having been paid to the administratrix there can be no good reason requiring it to be paid to another legal representative of James H. Latty. It is exempt from the payment of debts and is the distributive share of the minor children, and they are entitled by proper proceedings to require payment to be made to their guardian without any circumlocution, but in a direct proceeding against the proper parties. The cause is affirmed upon the ground that the plaintiff is not entitled to maintain the action.

AFFIRMED.

I. M. & N. P. R. Co. ET. AL. V. SCHENCK ET. AL.

1. **Taxation: IN AID OF RAILROADS: CONDITIONS OF TAX.** Where by the conditions of a tax voted in aid of a railroad it was not to be payable until the road was constructed between two specified points, the construction of a portion of the line and the purchase of the remaining portion will not render the tax payable, although the constructed portion extends through the township in which the tax is voted.

Appeal from Jasper Circuit Court.

WEDNESDAY, OCTOBER 19.

ACTION of *mandamus* to compel the defendants, who are trustees of Fairview township, Jasper county, to certify to the county treasurer a certain railroad tax which it is alleged was voted to aid the construction of plaintiffs' road. The relief demanded by the plaintiffs was denied, and they appeal.

Ryan Brothers and Cook & Dodge, for appellant.

M. E. Cutts, for appellee.

ROTHROCK, J.—This case in its essential features is similar

to *Lamb v. Anderson*, 54 Iowa, 190. In that case it was held the tax was not collectible because the railroad company did not construct a railroad through Newton township, but purchased a completed road of three and one-fourth miles in length from another corporation.

1. TAXATION:
in aid of rail-
roads: condi-
tions of tax.

It is contended by counsel for appellants that this case is distinguishable from the case cited because no part of the purchased road was in Fairview township. But it was expressly stipulated by the plaintiff company that "any and all taxes so voted in said township may remain unpaid until the road-bed of said railway is graded, tied, and ironed from the town of Monroe to the town of Newton." It seems apparent to us that this obligation was not performed by the purchase of a constructed road from another company for any part of the distance between the points named, whether such purchase was of a road within or without Fairview township. The fact that two roads were being constructed in the vicinity may have been a material consideration in inducing the voters to cast their ballots for the tax. As the tax was not collectible without a compliance with the contract upon which it was voted, we think the court below properly denied the plaintiff the relief demanded.

AFFIRMED.

BLACK V. HOWELL ET AL.

NORMAN V. HOWELL ET AL.

1. **TRESPASS: WRONGFUL SEIZURE OF PROPERTY: REMEDY.** Where property is wrongfully seized and sold under a chattel mortgage the owner is not confined to his remedy by contesting the foreclosure of the mortgage, but may maintain at once an action at law to recover the property or its value.

Appeal from Jasper Circuit Court.

WEDNESDAY, OCTOBER 19.

THESE actions are for the recovery of the value of a mule and a cow alleged to have been wrongfully detained from the plaintiffs by the defendants. There was a trial to the court and a judgment for the defendants. The plaintiffs appeal.

John C. Meredith and Smith & Wilson, for appellants.

J. B. Naylor and H. S. Winslow, for appellees.

ROTHROCK, J.—I. The appellees urge that there can be no hearing upon the merits of the appeal because the evidence has not been preserved by a bill of exceptions. It appears from the abstract, however, that no evidence was offered, but the case was heard upon a written agreement of facts, signed by the parties. A complete transcript, which has been filed by some one, shows that this agreement of facts was duly filed. It was thus made of record without being incorporated in a bill of exceptions.

II. The facts agreed upon are in substance as follows: One Crews made a chattel mortgage of the property in controversy, to one Kenworthy. Kenworthy sold and transferred the mortgage to one Love. While Love was the owner of the mortgage, and also the holder of the debt it was given to secure, he verbally released

1. **TRESPASS:** wrongful seizure of property: remedy.

Black v. Howell.

the mule and cow to the plaintiffs, having received a consideration therefor. At the time of the release the plaintiffs took possession of the property and held the same. After the release of the property, Love sold and transferred the mortgage and debt it was given to secure to the defendant Roberts, who took the same with notice of release to plaintiffs. Roberts placed the mortgage in the hands of Howell, a constable, for the purpose of foreclosure. Howell took the mule and cow from the plaintiffs, and served a notice upon them of his proceedings, and sold the property in satisfaction of the mortgage. The plaintiffs commenced their suits before the sale was made under the mortgage foreclosure proceedings, and claimed to recover under their purchase and verbal release, which was made to them before the debt became due. It is admitted the plaintiffs are entitled to recover unless the proceedings in foreclosure are a defense to the case as made by plaintiffs. It appears to us that there ought to be no question as to the plaintiffs' right to recover under these facts. When Love received his consideration for the property and released it from the lien, and the plaintiffs took possession of it, Love had no further claim upon it. Any interference of the plaintiffs' ownership and possession of the property by Love or by any officer under his direction would have been a trespass, for the very good reason that he had no lien upon nor interest therein. The defendant Roberts, having notice of the release, stood in Love's shoes and had no right which Love did not have.

It appears that the mortgage was sought to be foreclosed under chapter 4, title 20, of the Code, by notice and sale. The court below appears to have been of opinion that Sec. 3317 provides an exclusive remedy for parties desiring to contest a foreclosure. It is as follows: "The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any one interested in so doing, and the proceeding may be transferred to the Circuit or District Court, for which purpose an injunction may issue if necessary." It cer-

Kimball & Mitchell v. Bryan.

tainly never was contemplated that where a person's property is seized without a shadow of right, upon the pretense that it was once mortgaged, the owner must go into a court of equity and restrain a foreclosure by injunction. We think he is not required to invoke any such dilatory proceeding; but that he may at once institute an action at law for the recovery of his property.

It was agreed that if the plaintiffs were entitled to recover there should be a judgment for the mule for \$52.50 and costs, and in case of the cow a judgment for costs only. The cause will be reversed and remanded for a judgment for plaintiffs in accord with said stipulation.

REVERSED.

56	632
84	719
56	632
101	64
56	632
104	586
56	632
120	586
56	632
139	249

KIMBALL & MITCHELL V. BRYAN.

- Practice: PLEADING: AMENDMENT.** An amendment to a petition may be filed without leave of court at any time before answer, and notice of such amendment to the adverse party is waived by an appearance thereto; an amendment to a petition on account setting up a draft signed by the defendant, and alleging that the indebtedness thereon is the same as that shown by the account, is not inconsistent with the petition and does not render necessary a new original notice.
- : —: —.** A party may thus plead the same indebtedness in different courts without rendering the pleading subject to demurrer.
- Statute of Limitations: EFFECT OF FILING MECHANIC'S LIEN.** The fact that a claim for a mechanic's lien is filed and then allowed to become barred by the statute of limitations will not operate to bar an action to recover the indebtedness on which the claim is founded.
- Draft: PAROL EVIDENCE TO VARY TERMS OF.** Parol evidence is not admissible to show that a draft payable by its terms in money is in fact, by the understanding of the parties, payable in something else.
- : LIABILITY OF DRAWER: PRESENTMENT AND NOTICE.** The drawer of a draft which he had no reasonable ground to believe would be honored is liable thereon without proof of presentment and notice of non-payment.
- Practice: CONTINUANCE.** A showing for continuance held insufficient.

Kimball & Mitchell v. Bryan.

Appeal from Story District Court.

WEDNESDAY, OCTOBER 19.

IN 1874 the defendant entered into a contract with Rev. John F. Brazill, whereby he agreed to construct for said Brazill a church building. For the purpose of constructing the building he purchased of the plaintiffs a bill of lumber amounting to about \$849.00. This action is brought to recover for such lumber. The plaintiffs in the first place declared upon account. Afterward, before answer or any appearance on the part of the defendant, they filed an amendment to their petition declaring upon a written order or bill of exchange, drawn by defendant in their favor upon said Brazill for \$830. They averred that the consideration for which the same was drawn was the same indebtedness set out in the account. The defendant filed a motion to strike out the amendment, which motion was overruled and he excepted. He then filed a demurrer to the amendment, which demurrer was overruled and he excepted. He then filed an answer both to the original petition and to the amendment. The plaintiffs filed a motion to strike out parts of the answer to the amendment, which motion was sustained, to which the defendant excepted. There was a trial by jury. The court instructed the jury to find for the plaintiffs the amount of the order with six per cent interest from date. A verdict having been rendered accordingly, and judgment having been rendered thereon, the defendant appeals.

N. A. Rainbolt, for appellant.

Brown & Dudley and *Dyer & Fitchpatrick*, for appellees.

ADAMS, CH. J.—I. The motion by defendant to strike out the plaintiffs' amendment to their petition is based upon the ground that it was filed without notice to defendant or leave

 Kimball & Mitchell v. Bryan.

of court, and sets up a cause of action not mentioned in the original notice and inconsistent with the cause of action set out in the original petition.

As to the want of leave of court to file the amendment, it is sufficient to say that it is expressly provided in section 1. PRACTICE: 2647 of the Code that leave of court is not necessary where the amendment is filed before the answer. It is true that, before any advantage can be derived from the amendment, notice thereof must be served upon the defendant or his attorney. See section of Code above cited. But where the defendant appears to the amendment and moves to strike out, or demurs, or answers, the necessity for the service of notice must be deemed to be obviated. In this case the defendant appeared and moved to strike out. The objection, then, to the amendment, based upon want of leave of court, and want of notice, we think is not well taken.

As to the objection based upon the ground that the amendment sets up a cause of action not mentioned in the original notice, and inconsistent with the cause of action set up in the original petition, we have to say that we think that that also is not well taken. The plaintiffs by their amendment simply added a count to their original petition, and in that count they show that they declare for the same indebtedness. The original notice of a claim for the indebtedness in the form of an account must, we think, be deemed to cover a claim for the indebtedness in whatever other form it may be set up by amendment.

Nor do we think there is any such inconsistency between the two counts as should prevent their being joined in the same pleading. *Pearson v. Milwaukee & St. Paul R. Co.*, 45 Iowa, 497; *Jack & Toner v. Des Moines & Ft. Dodge R. Co.*, 49 Iowa, 627; *VanBrunt & Co. v. Mather et al.*, 48 Iowa, 503.

II. The defendant's demurrer to the amendment is based upon the ground that if he is indebted upon the account, as a —: —; the petition avers, he could not be indebted upon the order.

Kimball & Mitchell v. Bryan.

This may be conceded, and yet, under the authorities above cited, it is proper to plead the same indebtedness in different counts and in different ways.

The plaintiffs insist that these rulings of the court upon the motion to strike, and upon the demurrer, are not reviewable for the reason that the defendant waived his right to review thereon by answering. The defendant insists that his answer is not of such a character that it should be held to constitute a waiver. We have not gone into the question, as it appeared very clear to us that the action of the court in the rulings was without error.

III. The defendant, in his answer to the plaintiffs' amendment setting up the order, denied "that it was a written obligation of defendant, or new promise to pay, or any promise of defendant to pay the sum therein named, or that it was ever given with such intent or understanding between plaintiffs and defendant." The plaintiffs moved to strike out the words above quoted, and their motion was sustained. The defendant complains of the action of the court in this respect. He insists that the words should be taken with other words in the answer, wherein he avers that the order was given without consideration. But in the same answer the defendant says that the order was given for the lumber bill. It was certainly, then, not without consideration, and what "the intent or understanding" was the order shows, and it was not competent to aver and prove to the contrary.

IV. The defendant in his answer to the original petition averred "that as original contractors plaintiffs filed a mechanic's lien against said church building, and afterward negligently and carelessly suffered the same to be barred by the statute of limitations without attempting to enforce it." The plaintiffs moved to strike out the words above quoted and their motion was sustained. The defendant complains of the action of the court in this respect. The averment seems to have been drawn with the idea that where a person has a mechanic's lien, which he neglects to en-

3. STATUTE OF
limitations:
effect of filing
mechanic's
lien.

Kimball & Mitchell v. Bryan.

force until it is too late, the debt itself becomes barred. But there is no warrant for such conclusion, and we do not understand the defendant as seriously maintaining that there is. His position now seems to be that if the plaintiffs filed a lien as contractors and not as subcontractors, as the averment shows, such fact would have the effect to show that they agreed to look to Brazill alone, as defendant avers that they did agree to do.

But the manner in which they filed their lien would at most be only an admission subject to explanation, and not necessary to be pleaded. We think that the court did not err in sustaining the motion.

V. Upon the trial the defendant offered to show that the plaintiffs filed a mechanic's lien. The plaintiffs objected to such evidence and the court refused to admit it.

In this we think that there was no error. The defendant did not offer to show that they filed a lien as contractors. In no other view could the filing of a lien have any significance, if indeed it could in that.

VI. One of the plaintiffs testified in their behalf. Upon cross-examination he was asked a question in these words:

4. DRAFT:
parol evi-
dence to vary
terms of. "You then knew that if this order was good Brazill had the right to pay it in such material as he owed Bryan; that the order was drawn on such fund as Mr. Bryan had in the hands of Brazill, did you not?" The plaintiff objected to the question and the objection was sustained.

There was evidence tending to show that Brazill was to pay the defendant by turning out to him without recourse promissory notes of different individuals who were interested in securing the building of the church, and whose notes had been placed in Brazill's hands for that purpose. The defendant averred in his answer that the plaintiffs agreed to take their pay in such notes and to look to Brazill for them. The question was asked for the purpose of showing that the order drawn by defendant on Brazill was payable in such notes.

Kimball & Mitchell v. Bryan.

But the effect of such evidence would have been to contradict the order. By its terms it was payable in money. It was drawn in these words:

"\$830. MITCHELLVILLE, IOWA, October 22, 1870.

"*To Rev. John F. Brazill.*

"Please pay to Kimball & Mitchell eight hundred and thirty dollars and charge to the account of

SOLON BRYAN."

It is certainly not competent to show by parol evidence that an order drawn payable in money was understood in fact to be payable in something else. We think that the court did not err in excluding the evidence.

VII. The defendant insists that the court erred in instructing the jury to find a verdict for the plaintiff on the written order. He maintains that the evidence shows that the order was not duly presented to the drawee for acceptance, and that due notice of its non-acceptance was not given to the drawer.

It may be conceded that the general rule is that the drawer of an order like the one in question can be charged only by due presentment of the same to the drawee, and due notice to the drawer of dishonor. But this does not appear to be necessary where the drawer had no reason to suppose that the order would be honored. The rule as expressed in 1 Parsons on Notes and Bills, 532, is as follows: "The true test in our opinion in each case is this: Had the drawer under the circumstances a right to draw? This depends upon the fact whether he had a reasonable ground to expect that the bill would be honored or not. If he had such reason to expect it to be honored he is entitled to a regular presentment and notice of refusal to accept or to pay, and if not so entitled he cannot complain either for negligence in presenting and forwarding notice or for an entire neglect to do either." See also in this connection *Dickens v. Beal*, 10 Peters, 572; *Wallenweber v. Kittlerlirnes*, 17 Penn. St., 389; *Kinsley v. Robinson*, 21 Pick., 328.

Kimball & Mitchell v. Bryan.

The defendant's answer shows that in drawing the order upon Brazill he relied upon the proceeds of his contract with Brazill. But according to the terms of that contract Brazill was to turn out notes without recourse. We are unable to discover any ground upon which the defendant could reasonably have supposed that the drawee, Brazill, would honor an order payable in money. We do not say that there must necessarily be money in the hands of the drawee to give the drawer a right to draw. We can conceive of other circumstances which would probably be deemed sufficient. But the circumstances of this case, we think, preclude the supposition of a right to draw. Indeed the defendant in his answer says that the order was intended as nothing more than an assignment to the plaintiffs of an interest in the contract between him and Brazill. Being drawn for money it is safe to say that defendant did not expect that Brazill would honor it upon presentment, and the evidence shows that Brazill refused so to do.

VIII. Before the trial commenced the defendant moved for a continuance on account of the absence of a witness who lived at Des Moines. He shows that he caused a
6. PRACTICE:
continuance. subpoena to be issued and sent the same to the sheriff of Polk county to be served on the witness, and sent also five dollars to pay for service, mileage and fees. Whether the subpoena was served is not shown. The plaintiffs objected to the motion on the ground among others that it did not appear that the defendant exercised proper diligence. We think that the objection was well taken. The money sent does not appear to have been sufficient, to say nothing of a want of diligence in other respects.

We see no error in the rulings of the court, and the judgment must be

AFFIRMED.

SIMPLOT ET AL. V. THE CITY OF DUBUQUE.

1. **Estoppel:** MUNICIPAL CORPORATION: EVIDENCE CONSIDERED. Evidence considered and held sufficient to establish facts which estopped the defendant city from claiming title to certain real estate as against the plaintiffs.

36	639
89	24

Appeal from Dubuque District Court.

WEDNESDAY, OCTOBER 19.

ACTION in equity to restrain the defendant from entering upon and improving as a street a small triangular tract of land within the limits of the defendant city; and to quiet title to the same. The defendant denies that the plaintiffs are the owners of the land, and avers that the land is public, and that the title is held in trust by the defendant city for the public. There was a decree for the plaintiffs. The defendant appeals.

James H. Shields, for appellant.

Myron H. Beach, for appellee.

ADAMS, CH. J.—This cause was tried originally upon oral testimony, and judgment was rendered for the defendant.

1. **ESTOPPEL:** Upon appeal the judgment was reversed. 49 municipal corporation: Iowa, 630. It was held by this court that the evidence considered. acts of the defendant city had been such that it was estopped from setting up title to the property. We are not at liberty now to review the correctness of that decision, because it has become the law of the case. *Adams County v. B. & M. R. R. Co.*, 55 Iowa, 94.

It is contended, however, that upon the former appeal the court misapprehended the facts; and furthermore that upon this appeal there is a somewhat different showing as to the facts. The defendant claims that the facts now shown, but

Simplot v. The City of Dubuque.

not shown upon the former appeal, or misapprehended, are: that the land in controversy was a part of Front street; that this is admitted by the plaintiffs; that it was never claimed by them as a part of lot 530, of which it is conceded that they are the owners; that it is not true that the plaintiffs, and those through whom they claim, have occupied it since 1840, and that they only claim to have occupied it since 1853; that the city council did not order the land in controversy filled, but only lot 530, and that the plaintiffs or those through whom they claimed only paid for filling lot 530; that the plaintiffs were never required to pay for macadamizing First street abutting the land in controversy, and that prior to the act of February 14, 1853, the land had been used as public property.

We shall not stop to inquire whether all the above facts are true as claimed by the defendant. We think that it is not shown that the land was ever used as public property. It appears, to be sure, from the testimony of one of the plaintiffs, that some time prior to 1860 a roadway run over the triangle. But it appears very clearly that this roadway was not traveled as a street. One Everett testified that he had been a resident of Dubuque for about forty years, and was a surveyor and civil engineer, and had been city engineer. He says that First and Iowa streets have been traveled as they now are to their point of intersection ever since he came to Dubuque, except when the travel was prevented by high water. He further says that he does not remember seeing any part of the triangle traveled over, and that if any of it was traveled over, it must have been a small point in the corner of First and Iowa streets. The plaintiff, upon whose testimony the defendant relies, was, when he gave his testimony, forty-two and one-half years old. From the testimony of Everett we have a statement of the condition of things from a time antecedent to the plaintiff's memory. Taking the testimony of Everett and the plaintiff together the fact appears to be that while First and Iowa streets were

traveled as they now are, the travel had overspread what Everett calls a small point in the corner. Such use, we think, could not be deemed more than an accidental use by individuals as distinguished from the public.

But the defendant relies upon the testimony of one Cain as showing that the land was devoted to a public use. He testifies that wood and lumber were landed there from the river. But we cannot attach much importance to such use. Iowa street intervened between the land and the river. If wood and lumber were landed there, it must have been in high water. Everett says that he had never known this land to be considered as a part of the levee. Possibly it may have been so considered by some people, but with a street intervening it could hardly have properly been so considered. At all events the mere use of the land for landing wood and lumber in high water would not necessarily constitute a public use. There is evidence that the water sometimes rises even higher than this land.

The triangle in controversy, taken together with lot 530, made a rectangle, and that rectangle was of the same form and size as lot 529 and other lots in the neighborhood. The triangle had the appearance of a tract cut off from lot 530. First and Iowa streets were so constructed that the triangle appeared to be thrown out from public use. We infer that it was not thought to be needed for public use. What the city was interested in was the improvement of First and Iowa streets, and in having the triangle property filled. The Simplots, about 1853, took possession of it as a part of lot 530, or as a corner thrown out by the city and which might be taken and utilized in connection with lot 530. The city, it appears to us, treated the triangle as belonging to the Simplots and a part of lot 530. The defendant, it is true, denies this, and it must be conceded that the evidence when carefully examined is rather meager. But still we think it is sufficient to establish the fact. The evidence upon which the plaintiffs rely is their own testimony. Alex. Simplot says:

Sweet, Dempster & Co. v. Oliver.

"The streets were run out on both sides, Iowa and First streets, and we were required to fill this triangle." * * * "We had to pay all the expenses that were put upon that locality." * * "I cannot find the bills, but I remember several times of our paying them. We paid for macadamizing Iowa street on the east side of the triangle. In early times I know that there would be a marshal or deputy around with bills for macadamizing." * * "We paid bills before Kavanaugh did his work." Charles Simplot says: "The triangle was the lowest spot in the property, and the heaviest part of the filling was there. We were ordered to fill up and were tardy, and the city did it."

Now taking this testimony together it amounts to this, that the Simplots were ordered to fill the triangle; that they neglected it; that the city filled it and compelled the Simplots to pay for it. There may, it is true, have been better evidence of the compulsion than Alex. Simplot's mere statement that they "had to pay all the expenses that were put upon that locality," but the evidence was not objected to, nor was there anything to contradict it.

The defendant claims that certain receipts put in evidence contradict it. The receipts showed payment for filling simply lot 530, but it may have been true as the witness testified, that the Simplots "had to pay all the expenses that were put upon that locality." The cost of filling the triangle may have been included in the receipts as if it was a part of lot 530.

We see nothing in the facts now shown to render the rule of law announced upon the former appeal inapplicable, and taking that to be the correct rule, as we must, the judgment must be

AFFIRMED.

McDONALD v. JACKSON.

1. **Promissory Note: RECOVERY ON DESTROYED NOTE.** A recovery can be had on a note which has been destroyed only when it is clearly shown that such destruction was the result of accident or mistake; where it was in pursuance of a fraudulent scheme of the holder no recovery is permissible.

Appeal from Monroe Circuit Court.

WEDNESDAY, OCTOBER 19.

THE petition contained seventeen counts, but no claim is made on this appeal except on the second and sixteenth, on which there was a trial to the court, judgment for the defendant, and plaintiff appeals.

H. L. Dashiell, for appellant.

Perry & Townsend, for appellee.

SEEVERS, J.—The substance of the second count in the petition is that on or about April 5th, 1872, the defendant executed and delivered to one Willcox his note for \$179.34, with ten per cent interest from date; that said note had been destroyed, therefore the plaintiff was unable to attach a copy to the petition. Following this count there were thirteen other counts which are not set out in the abstract, in which, as we understand, a recovery was sought on other notes and accounts, all of which notes including the one described in the second count had been destroyed, as plaintiff alleged, “under the following circumstances.

“On the 22d day of April, A. D. 1873, the said defendant and the said Jeremiah Willcox met for the purpose of settling and adjusting the amount due from the said defendant to the said Willcox; that thereupon all the notes hereinbefore described, together with a certain book account held by the said

McDonald v. Jackson.

Willcox against the said Jackson, were embraced and included in a note for \$6,088, dated April 22, 1873, executed by said defendant and made payable by the direction of said Willcox to this plaintiff, and payable four years after date, and thereupon the said notes held by the said Willcox against the said Jackson were given up to the said Jackson and the same destroyed.

“That on the 11th day of September, 1877, the plaintiff instituted a suit on the note of April 22d, 1873, and the mortgage given to secure the same, in which suit it was finally decided at the October term, A. D. 1879, of the Supreme Court of Iowa, that said note and mortgage were fraudulent and void, and that plaintiff's only remedy was to sue for the amount due from the said defendant to the said Willcox at the time said note of April 22d, 1873, was executed, wherefore she brings this suit upon the notes and mortgage hereinbefore described.”

The defendant demurred to said count and the same was overruled and thereupon an answer was filed, in which the defendant admitted he had executed to said Willcox a note for about \$179, but denied he was indebted thereon because the same had been destroyed by the fraudulent act of Willcox, as stated at length in the answer, but which need not be repeated here, it being sufficient to state the fraud relied on is the same as that found by the court in *Willcox v. Jackson*, 51 Iowa, 208, the note sued on being one of those upon which it was claimed the settlement referred to in that case was based.

I. It is urged by counsel for the appellant, as the demurrer was overruled, the court must have held, upon the facts stated in the petition, the plaintiff was entitled to recover, and as he insists the same facts and nothing additional was alleged in the answer than stated in the petition in relation to the settlement and new note, therefore the ruling on the demurrer should be held to be conclusive as to the plaintiff's right to recover. The claim being, as we understand it, if upon the face of the petition it appears the plaintiff is not entitled

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to recover, the defendant must demur and cannot raise the objection by answer. This is claimed to be the true construction of Code, §§ 2648 and 2650. In support of this view *McCormick v. Blossom*, 40 Iowa, 256, and *Ryan v. Mullinix*, 45 Id., 631, are cited. Deeming it unnecessary we shall not stop to discuss the question presented.

It will be observed the petition merely states the note was destroyed, or the same was "given up to said Jackson and destroyed." It was upon these allegations the demurrer was overruled. Quite a different defense is alleged in the answer. Therefrom it appears the same was destroyed by Willcox in pursuance of and for the purpose of effectuating a fraudulent scheme concocted by him. Such defense was well pleaded, and for reasons hereafter stated decisive of plaintiff's right to recover.

II. Counsel for appellant further insist the defendant should not be permitted to rescind the fraudulent note and mortgage and also defeat this action, which is brought on notes given up when the fraudulent note was executed. Possibly this may be so. But if reference is had to 51 Iowa, 208, before cited, it will be found that action was brought to enforce the fraudulent note and mortgage and the defendant merely resisted a recovery. He did not ask to rescind or any affirmative relief whatever, nor does he do so in this action, the question here being whether the plaintiff can recover on notes which he destroyed in pursuance of a fraudulent scheme.

III. The court found that Willcox had intentionally destroyed the note sued on as a part of a fraudulent scheme.

1. PROMIS-
SORY NOTE:
recovery on
destroyed
note.

In that finding we concur. The ground of our conclusion need not be stated because we do not understand counsel for appellant to seriously question its correctness. This being so the plaintiff should not be permitted to recover. Without stating our reasons at length, it is deemed sufficient to state what we understand to be the established rule, and that is, a recovery may be had

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on a destroyed note only when it has been clearly established it was destroyed through ignorance or by mistake. 2 Parsons on Notes and Bills, 293; *Blake v. Noland*, 12 Wend., 173. Even if we are mistaken as to the rule we would be unwilling to hold a person could recover on a note he had destroyed in pursuance of a fraudulent scheme.

IV. In reference to a recovery on the sixteenth count counsel for the appellant concedes the evidence is "general and indefinite and does not describe any particular note with certainty unless the entry on the book of account set out as 'A' is an identification of the note given for the account." Before a recovery can be had on a note destroyed by the holder the evidence as to the amount, terms and identity should at least be reasonably clear and specific. Exhibit "A" in no material degree aids the evidence of Hewitt, and taken altogether is insufficient.

AFFIRMED.

GEORGE V. HOWARD ET AL.

1. **Promissory Note: REFORMATION OF: EVIDENCE CONSIDERED.**
Evidence considered and held insufficient to establish a mistake in a promissory note, such as would warrant its reformation.

Appeal from MaKaska Circuit Court.

WEDNESDAY, OCTOBER 19.

ACTION on a promissory note payable one year after date, to the order of M. R. George, and by him assigned to the plaintiff. The defendant pleaded the consideration of the note was certain real estate sold by the payee to one of the defendants, and that the purchase money was to be paid in wood at two dollars and fifty cents per cord; that defendant G. W. Howard agreed to become surety for the per-

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formance of said contract; that if said defendants had known the note was not payable in wood they would not have signed it; that after it was signed, and before delivery, they caused said note to be read, and then ascertaining it was payable in money they both repudiated it, and stated they would not be bound thereby, whereupon the payee by artifice, force, and stealth, obtained possession of said note. The relief asked was that the cancelation of the note be decreed, or the same reformed so that it should be made payable in wood, in accordance with the contract. It was not claimed by the plaintiff the note had been assigned to him before due without notice of equities. Trial to the court, judgment for the plaintiff, and defendants appeal.

F. M. Davenport, for appellants.

John F. Lacey, for appellee.

SEEVERS, J.—Errors have been assigned, in substance that the finding of the court was against the evidence. Counsel for the appellants say: "There is a conflict of evidence as to the real transaction at the time of the trade as to how the land should be paid for." An examination of the evidence satisfies us this concession is correct. We cannot, therefore, under the settled practice of the court reverse on the errors assigned if this should be regarded as an action at law.

There are doubts whether there can be a trial anew, because of the insufficiency of the certificate of the trial judge; but it will be so regarded. We have therefore examined the evidence, and therefrom conclude the defendants have failed to establish by a preponderance of the evidence the note should have been drawn payable in wood. As to the allegation that possession of the note was obtained by artifice, fraud or stealth, the preponderance is with the plaintiff. We do not deem it necessary to set out the evidence at length. Such is not our usual practice. It is sufficient to say that we regard the fact that the defendants, knowing the note was payable

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in money, took possession of the real estate and used it as their own, as being a controlling circumstance which strongly corroborates the evidence of the plaintiff. It must be remembered the burden is on the defendants, and he who seeks to reform a written instrument should show clearly it had been executed through fraud or by mistake.

George Howard testified he saw the plaintiff in Missouri, and informed him the wood had been delivered in town as the contract required, and thereupon the plaintiff gave him an order for the note which was then in the hands of Walton, in Iowa. That such an order was given is admitted, and appellants rely greatly on this fact. The plaintiff testifies Howard came to see him in Missouri, and promised to pay certain money to Walton and others for the plaintiff, and send him a span of mules in payment of the note, and thereupon the order was given.

It is said it is unreasonable to suppose the plaintiff would give the order upon the promise of Howard to pay the money and deliver the mules. This may be so; but it is equally strange he would rely on what Howard said as to the wood having been delivered. We are therefore unable to say the giving the order is a controlling circumstance.

It is said the payee of the note admitted on more than one occasion the land was to be paid for in wood. And such may have been the contract. For the payee admits he agreed to take his pay in wood if the same was delivered at a time and place named. The note, however, is the best evidence of what the contract was, and the agreement may have been the land should be paid for in wood, and yet no mistake made in drafting the note; and we think this must be so or the defendants would not have taken possession of the land, knowing the note was payable in money.

AFFIRMED.

McHenry v. Sneer.

McHENRY v. SNEER ET AL.

56	649
108	30
56	649
121	486

1. **Tort: WHEN DAMAGES ARE NOT RECOVERABLE FOR.** The police judge of a city cannot maintain an action against the mayor and members of the city council to recover damages because of the passage of an ordinance requiring him to pay the fees of his office into the city treasury, and giving him a salary in lieu thereof for his services.
2. —: —. Neither can he recover damages from them because of directions given by them to the police to report violations of law to justices of the peace rather than the police court.
3. —: —. The fact that the defendants conspired together for the injury of the plaintiff will not constitute a cause of action against them where they did no unlawful act.

Appeal from Polk Circuit Court.

THURSDAY, OCTOBER 20.

ONE of the defendants was at one time mayor and the others members of the council of the city of Des Moines. The plaintiff was police judge of said city and brings this action to recover damages caused by certain wrongful acts done by the defendants. A demurrer to the substituted and amended petition was sustained, and the plaintiff appeals.

M. D. McHenry, pro se, W. E. Miller and Wm. Phillips,
for appellant.

Parsons & Runnells, for appellees.

SEEVERS, J.—It is said in the argument of appellant that the “substituted and amended petitions are both more circumstantial than they should have been,” and what is termed a more “concise statement containing the essence” of said petitions is set out in the argument and we adopt it as being correct. It is as follows:

“1. Plaintiff was elected to the office and entered upon the duties of police judge of the city of Des Moines for a full

term of two years, commencing on the 4th day of March, 1878.

"2. At that time, by the laws of the State and ordinances of the city, the police judge was entitled to collect and receive from parties, defendants, of the county or the city, as the case might be, the same fees as justices of the peace were entitled to collect in like cases, and, in addition, one dollar for clerk's services in each case.

"3. That the fees aforesaid, according to the course of business usually current in the court, amounted to four thousand dollars a year, and from the commencement of plaintiff's labors in the court in March, 1878, until October of the same year were worth at that rate.

"4. The defendant Sneer was mayor and the other defendants members of the city council, and they, well knowing the premises, and that by law the plaintiff's emoluments could not be diminished during his term, the city council, the defendants concurring, about the 28th of March, 1878, passed an ordinance fixing the salary of defendant as police judge at one thousand dollars a year, in lieu of all fees, and requiring him to collect in all cases the same fees as theretofore, but to pay all fees into the city treasury. Which ordinance was void. That the plaintiff refused to accept this salary and claimed the fees.

"5. That thereupon the defendants, conspiring together to punish the plaintiff for official acts, in the course of his business, which were distasteful to them or some of them, and in order to compel and force him to accept said salary in full of all compensation, and to pay over his fees into the city treasury, did maliciously and unlawfully agree together that said Sneer, as mayor of the city, should direct the police force of the city to report no arrests made for violations of State laws or city ordinances to the police court, with the malicious purpose and intent of depriving plaintiff of the usual fees of his office, and with no regard to the proper enforcement of the law. And that the other defendants, at the request of Sneer

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and in malicious concert with him, prepared certain resolutions which all the defendants procured to be adopted by the council, unlawfully directing the city solicitor to bring prosecutions under State laws instead of city ordinances; requesting the mayor to order the police force to make returns of arrests in all cases to justices of the peace instead of the police court. * * * All which was without authority of law, and done under color and not by virtue of their offices.

"6. That Sneer, under said illegal advice, and acting for months in concert with the other defendants, did order and procure the police of the city to make no arrests for violations of city ordinances, nor make returns of any persons arrested for unlawful conduct to the police court, with the unlawful and malicious intent to cut off plaintiff's emoluments and compel him to accept said one thousand dollars and pay his lawful fees into the city treasury. Although plaintiff in fact says that there were a great many violations of law and city ordinances, which, on account of said orders, were allowed to go unpunished, and large numbers of persons arrested were, in consequence of said orders, returned to and prosecuted before justices of the peace, who, but for said orders, would have been prosecuted in the police court, by which plaintiff was deprived of the usual and appropriate business of the police court and of many hundreds of dollars of emoluments which would otherwise have accrued to him."

The demurrer is lengthy, and states seven grounds why the plaintiff should not recover. No complaint is made it is not sufficiently specific. Instead, therefore, of setting it out we deem it sufficient to say it in substance presents the question that the facts stated are not sufficient to entitle the plaintiff to the relief asked.

The right to recover we think depends upon a proposition or two which may be briefly stated. *First.* Did the plaintiff have the legal right to the fees fixed by law during the whole term for which he was elected, and if he did could the defendants by ordinance deprive him of

1. TORT :
when recov-
erable for.

McHenry v. Sneer.

such emoluments? Whether he was so entitled it is unnecessary to determine, for if he was, his right thereto still exists, the ordinance being simply void. It was not in the power of the defendants to deprive the plaintiff of a fixed and vested right. If he was not so entitled to said fees then the defendants did nothing unlawful in enacting the ordinance. *Second.* Did the defendant as police justice have exclusive jurisdiction of violations of the criminal laws of the State or of the ordinances of the city? It is not claimed he had. But it is said 2. —: —. the defendants directed offenders when arrested to be taken before justices of the peace and thereby the defendant was deprived of the fees he would have received if such offenders had been taken before him. This action on the part of defendants is said to have been unlawful. There is no statute so providing, and we are unable to see why the defendants as the representatives of the city could not for the city, like natural persons, select its tribunal. Unless the jurisdiction of the police justice was exclusive he has not been deprived of anything to which he was legally entitled. *Third.* Has the plaintiff a right of action against the defendants because many violations of law were allowed to go unpunished, 3. —: —. and because the defendants acted with no regard to the proper enforcement of the law? Clearly not, we think. For the matters just stated the defendants are amenable only to the public, and the defendant has no such interest therein as to give him a right of action. In this subject there is no difference in principle between this case and *Welch v. Board of Supervisors*, 23 Iowa, 199.

As the defendants did nothing unlawful, it is immaterial whether they conspired to do so or not. Besides, the demurrer only admits what is well pleaded, and there are no facts alleged upon which such a charge can be properly based. The allegation that parties conspired together and maliciously did an act cannot alone make a cause of action where nothing unlawful has been done. Cooley on Torts, 189-279.

AFFIRMED.

Hueskamp Brothers v. Van Leuven.

HUESKAMP 'BROS. V. VAN LEUVEN ET AL.

1. **Garnishment: PRACTICE: SETTING ASIDE DEFAULT.** The setting aside of a default against a garnishee held proper, under the showing made.
2. ———: **LIABILITY OF GARNISHEE.** A garnishee cannot be held liable because of an indebtedness on a written lease, payable to another than the defendant, though it is shown that the leased property is in fact owned by the defendant.

Appeal from Polk Circuit Court.

THURSDAY, OCTOBER 20.

THE plaintiffs obtained a judgment against the defendant Mrs. J. A. Van Leuven, for the sum of \$409.38. Afterward they caused an execution to be issued, and garnished the defendant W. M. Jones. He made default and judgment was taken against him for \$345.64. Afterward Jones appeared and filed an answer setting up certain matters in excuse of his default and denying all indebtedness. There was a trial by the court. The default was set aside and Jones was discharged as garnishee. The plaintiffs appeal.

*Bryan & Bryan, for appellants.**Jones & Blair, for appellee.*

ADAMS, CH. J.—I. The plaintiffs claim that the court erred in setting aside the default.

The answer of Jones shows that he appeared in court in response to his summons as garnishee and was ready to answer, but by an arrangement with the attorneys for the plaintiffs the taking of his answer was deferred; that he accordingly went away, and in his absence he was defaulted. If the facts set out in the answer were sufficiently established it appears to us that there was no abuse of discretion in setting aside the default. But

1. GARNISH-
MENT: prac-
tice: setting
aside default.

Hueskamp Brothers v. Van Leuven.

the plaintiffs insist that the facts set out in the answer were not established.

The answer appears to have been supported by an affidavit. At all events we find in the abstract, which was made by the plaintiffs, at the bottom of the copy of the answer the word "verified." This word we take to be the word of the abstractor, and was used by way of admission that the answer was sworn to, and so used to save the labor of setting out a copy of the jurat. Now while the plaintiffs filed a replication, which also appears to have been sworn to, they did not deny the facts relied upon to excuse the default. They merely denied the sufficiency of the excuse. It appears to us, therefore, that the facts were sufficiently established.

II. The answer denied all indebtedness to the judgment debtor, and Jones in his testimony upon the stand denied all indebtedness to her. By way of controverting the answer and the testimony the plaintiff introduced in evidence a lease wherein Jones bound himself to pay certain rent to the judgment debtor's husband, one B. F. Van Leuven. They then introduced B. F. Van Leuven as a witness, who testified that the premises leased by him to Jones were in fact the property of his wife. Upon this evidence the plaintiffs claim that the rent of the premises was due to her notwithstanding she was in no way a party to the lease.

The evidence shows that Jones entered under the lease and had the use of the premises. In an action brought for the rent by his lessor he could not have escaped liability to him by disputing his lessor's title. Nor do we think that he was liable to Mrs. J. A. Van Leuven also. She suffered him to hold possession under the lease during the period of the tenancy, and, as the evidence shows, with knowledge of the fact of the lease. The plaintiffs, indeed, do not claim that Jones was liable for rent except under the lease; but under that he was liable to nobody but his lessor. If the premises really belonged to Mrs. Van Leuven, possibly her creditors

Manuel v. The C., R. I. & P. R. Co.

by an action in equity, to which both B. F. Van Leuven and Jones should be made parties, might reach this rent. But in an action at law it is not for her nor her creditors to recover it and leave Jones still liable to his lessor.

We ought perhaps to say in this connection that the plaintiffs introduced in evidence a writing signed by both B. F. and J. A. Van Leuven, in which they agree that Jones shall pay the rent due and to become due under the lease to the plaintiff. It may be thought that this constitutes a virtual assignment of the rent to the plaintiff by the lessor.

If the plaintiffs have become the assignees of Jones' lessor they are doubtless entitled to recover as such all the rent which would otherwise be due from Jones to his lessor. But they cannot recover in this action. The only question presented in this action is as to whether Jones can be charged as debtor of Mrs. Van Leuven, who is the judgment debtor in the action.

The court below held that he could not, and we think that the judgment must be

AFFIRMED.

MANUEL V. THE C., R. I. & P. R. Co.

1. **Practice: PLEADING: NEGLIGENCE.** Where a petition claimed to recover of a railroad company for a personal injury caused by the negligent acts of co-employees, which acts were set out, it was held erroneous to refuse to instruct the jury that negligence must be proved in the manner alleged to authorize a recovery.

Appeal from Appanoose Circuit Court.

THURSDAY, OCTOBER 20.

THE plaintiff was an employe of the defendant, working on a construction train, and alleged in his petition that while so engaged his co-employees carelessly and negligently "let fall

56	655
124	174
56	655
138	424
138	425
56	655
142	663

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on the left foot of plaintiff a heavy iron rail," whereby he was greatly injured. In an amendment to the petition it is stated: "that the two co-employees who let said iron rail fall carelessly and negligently on the foot of plaintiff were Swedes or some foreign nationality."

There was a denial of the allegations aforesaid, and trial by jury. Verdict and judgment for plaintiff, and defendant appeals.

Vermillion & Vermillion, for appellant.

No appearance for appellee.

SEEVERS, J. The evidence tended to show the plaintiff and other employes of the defendant, at the time the accident occurred, were engaged in loading certain cars with old iron rails and bridge timbers. It became necessary to move some of the timbers after they had been loaded on a car; the plaintiff testified while so engaged two of his co-employees raised with crowbars an iron rail which they carelessly let fall on his foot. The evidence on the part of the defendant tended to show the rail was not raised with crowbars and did not fall on defendant's foot because of the negligence of the defendant's employes.

The court stated the issues correctly to the jury and in substance instructed them the plaintiff could recover if the injury was caused by the negligence of the defendant's employes, and the plaintiff had not been guilty of contributory negligence, but did not instruct the jury that before the plaintiff could recover he must have established to their satisfaction the injury had been caused in the manner alleged in the petition. The defendant asked the court to instruct the jury as follows:

"Plaintiff does not claim in his petition that the timber or railroad iron was loaded on the defendant's car in a careless or negligent manner and that he was injured thereby, but he

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does claim that two of defendant's employes let a bar of said railroad iron fall on his foot in a careless and negligent manner, and that he was thereby injured. This is the only negligence claimed by plaintiff, and if you find from the evidence that the plaintiff has failed to establish, by the weight or preponderance of the evidence in the case, that he was injured by said iron rail being dropped on his foot, as alleged in his petition, he cannot recover in this case, and your verdict should be for the defendant."

This instruction was refused. We think it should have been given. The issue is correctly stated, and only required the jury should be satisfied the injury was caused in the manner it was stated to have occurred in the pleadings. That such is the clearly established rule there is no doubt. Under the instructions given the jury might well conclude it was sufficient if the injury occurred in any manner because of the negligence of the employes of the defendant. The instructions given were general. The one asked directed the attention of the jury to the specific matters upon which the plaintiff's right to recover was based in the pleading. It therefore should have been given. *Haines v. The Illinois Central R. Co.*, 41 Iowa, 227; see also *Muldowney v. The Illinois Central R. Co.*, 32 Iowa, 176, and *Owen v. Owen*, 22 Id., 270.

REVERSED.

COHRT V. KOCK.

1. **Contract: FOR SALE OF LAND: WAIVER OF FORFEITURE.** A contract construed and held not to constitute a waiver of the right to declare a forfeiture of a prior contract for the sale of land, except as to previous defaults.
2. —: —: **RESCISSON.** The fact that by a contract for the sale of land the vendee agrees to assume payment of a mortgage thereon will not prevent the vendor from rescinding the contract for proper cause, where it does not appear that the mortgagee has accepted the substitution made by the contract.
3. —: —: —. Facts considered under which it was held that a vendee did not become entitled to a deed under his contract.

Appeal from Tama District Court.

THURSDAY, OCTOBER 20.

THE plaintiff, in 1877, made a written contract with the defendant whereby he sold to him an improved farm. The defendant entered into possession of the farm and enjoyed the use of it during the years 1878 and 1879, and in the meantime he paid a portion of the purchase money. He did not, however, meet all the payments as they became due. The first installment, falling due January 1, 1878, was not paid until October, 1878. The second installment, falling due January 1, 1879, became delinquent and has never been wholly paid. The contract provided that the payments were to be made promptly, and that time was to be of the essence of the contract. In February, 1880, this action was brought to rescind the contract. The plaintiff set up in his petition the failure of the defendant to make the payments as they became due. He admits certain payments, but avers that the use of the premises has been worth more to the defendant than the amount of such payments. By way of amendment to his petition he avers that the defendant is committing waste by destroying the fences and timber and an artificial grove, and asks for an injunction.

56	656
94	582
56	656
95	329

 Cohrt v. Kock.

The defendant filed an answer to the original petition and a motion to strike out the amendment. The motion was overruled. The defendant in his answer sets up certain payments in excess of those admitted by plaintiff, but does not show that he was not in default. He avers, however, that by reason of a contract subsequently entered into the plaintiff waived his right to insist upon a forfeiture. Other defenses are set up which will be noticed in the opinion. There was a decree for the plaintiff as prayed both in the original petition and amendment, and the defendant appeals.

Stivers & Bradshaw, for appellant.

Struble & Kinne, for appellee.

ADAMS, CH. J.—I. The defendant complains of the action of the court in overruling his motion to strike out the amendment. The alleged ground of the motion was "that the amendment and additional petition were filed after the answer of the defendant herein was filed, and after the last adjournment of the court, without any leave or permission of the court or defendant or his attorneys, and without any notice."

Whether, where an amendment is filed without leave of court, a motion to strike the same from the files must necessarily be sustained we need not determine. It is not made to appear in this case that the amendment was without leave. Besides, if the defendant had forfeited all right to the premises, as the court held, and was committing waste as the amendment averred, and as was not denied, the defendant cannot properly complain of the injunction sought by the amendment.

II. The subsequent agreement relied upon by the defendant as constituting a waiver on the part of the plaintiff of his right to insist upon a forfeiture was made between the plaintiff and one Reichoff. By it Reichoff released a chattel mortgage upon certain property belonging to the defendant, and turned out the

1. CONTRACT:
for sale of
land: waiver
of forfeiture.

property to plaintiff to be applied upon the defendant's indebtedness to the plaintiff. In consideration thereof an extension was granted upon the payment next to mature, to-wit., January 1, 1879. Plaintiff also agreed to waive "his rights under said contract of sale of land."

The defendant insists that the rights waived were the right to declare a forfeiture not only for past defaults but for any other default which might thereafter occur.

The words used, if taken by themselves and in their broadest signification, might include the right to be paid the purchase money. But they evidently do not mean that, because it is provided in the contract for an extension of a payment, and there could not be an extension of a payment which was not to be made at all. The defendant, indeed, does not insist that the words are to be taken in their broadest signification. As no right to payment, then, was waived, and no extension was given except as to one payment, we can discover nothing upon looking into the contract which could properly be deemed as waived except the right to declare a forfeiture, and it is not claimed by defendant that any other right was waived. The controversy is as to whether the plaintiff waived the right to declare a forfeiture for future defaults. In our opinion the language used should not be so construed. The defendant was still bound to make prompt payments. We can hardly suppose that the parties were providing for a contingency which under the contract they were not to anticipate. A default in one payment had then been made. What was waived, we think, was the right to declare a forfeiture for that default. We cannot think that the plaintiff intended more than that. According to our view, by the words "his rights under said contract" were intended his *matured* rights. Thus limited the language is natural. Extended beyond that it is not natural unless it means all his rights, which as we have seen cannot be admitted, and is not claimed.

In this connection we ought to observe that the defendant introduced parol evidence, under objection, as to what the un-

Cohrt v. Kock.

derstanding was at the time the contract was made. But in our opinion the contract must speak for itself.

III. As a further defense the defendant says that he assumed the payment of certain mortgages upon the property; ^{2. —: —.} that having by reason of such assumption become ^{rescission.} liable to the mortgagee, it would be inequitable to deprive him of the land and leave him thus liable, and that before the plaintiff could become entitled to rescind he should pay off the mortgages or secure the defendant's release in some way.

As to the alleged assumption we have to say that the contract is very obscure. We are not quite prepared to say that the defendant assumed the mortgages. But, conceding that he did, we think that the plaintiff was not precluded from rescinding. It does not appear that the mortgagee had done or said anything to indicate his acceptance of the defendant's contract to pay the mortgages, if there was such contract. Under the ruling, then, in *Gilbert v. Sanderson*, ante, 349, the defendant had incurred no such liability to the mortgagee as to prevent the plaintiff and defendant from making a complete cancellation of the contract, and we think it follows that the defendant had incurred no such liability to the mortgagee as to prevent the plaintiff from rescinding.

IV. One defense remains to be considered. The contract contains a provision in these words: "In consideration of ^{2. —: —.} the prompt payment of said sums said Cohrt ^{—.} agrees to make said Kock a good and sufficient warranty deed for said tract on the payment to be made January 1, 1878." No deed it appears was made, and the defendant insists that, while the payment falling due January 1, 1878, was not promptly made, yet, being made, the defendant became entitled to a deed when it was made; and that after that the plaintiff was no more entitled to declare a forfeiture than he would have been if he had complied with his contract and made the deed which he bound himself to make.

If the defendant at any time became entitled to a deed,

Lea & Beaman v. Henry.

there is some doubt whether after that a forfeiture could be declared. But the contract provides that the deed was to be made in consideration of prompt payment. Now the payment first falling due, to-wit., that falling due January 1, 1878, was not only not made when it fell due, but when afterward he succeeded in making it he was still in default, as it appears to us, by reason of the non-payment of certain interest which had fallen due, and we are unable to discover that there was any time when the defendant was not in default. We think that he has not shown that he ever became entitled to a deed.

In our opinion the decree of the District Court must be

AFFIRMED.

LEA & BEAMAN v. HENRY.

1. **Practice: CONTRACT: CONSTRUCTION OF LETTERS.** The question whether or not certain letters constitute a contract is one to be determined by the court, and it is error to submit such question to a jury.

Appeal from Wapello District Court.

THURSDAY, OCTOBER 20.

ACTION to recover for legal services rendered in behalf of the defendant's son, who was indicted and tried for the crime of burglary. The criminal trial resulted in a conviction. Upon appeal to this court the judgment was reversed and the cause remanded. Afterwards the indictment was dismissed. The plaintiffs by their petition claim that before the prosecution was finally dismissed, and while it was still pending, the defendant entered into a contract in writing by which she promised to pay them for their services in defense of her son. Issue having been taken upon the averments of the petition the cause was tried to a jury. There was a verdict and judgment for the defendant and plaintiffs appeal.

Lea & Beaman v. Henry.

Lea & Beaman, pro se.

S. W. Summers, for appellee.

ROTHROCK, J.—The alleged contract in writing was contained in two letters written by the defendant to the plaintiffs, and in certain other letters written by the plaintiffs to the defendant. The court instructed the jury that the first letter written by the defendant and the answer thereto created no contract binding the defendant to pay the plaintiffs for their services. As to the letters subsequently written, the court left it to the jury to say whether or not the defendant by the language used in the letters under the facts and circumstances meant to bind herself personally to pay the plaintiffs for their services. It was the province of the court as matter of law to determine and construe their meaning and legal effect. Parsons on Contracts, Vol. 2, 492. We do not regard it as our duty to set out these letters here at length. A careful examination of them satisfies us that they do not contain a distinct personal promise to pay the plaintiffs for their services. The court, we think, properly construed the first letter, and should have put the same construction on all of the correspondence between the parties considered together. But as the jury found for the defendant, the error in submitting the question to the jury as to whether part of the letters constituted a contract was without prejudice to the plaintiffs, because the jury merely found what the court should have determined, that is to say, that by a proper construction of the writings no personal contract was entered into by the defendant.

AFFIRMED.

BON V. THE RAILWAY PASSENGER ASSURANCE CO.

56 664
87 511

1. **Insurance: ACCIDENT POLICY: RECOVERY ON.** Under the provisions of a policy insuring the holder against accidents while traveling on the conveyances of any common carrier, provided he complied with the rules and regulations of such carrier and exercised due diligence for self protection, it was held that a passenger on a railway car, who was injured by being thrown from the steps of the car, where he stood while the train was approaching a station, in violation of a known rule of the company, was not entitled to recover.

Appeal from Wapello Circuit Court.

THURSDAY, OCTOBER 20.

THIS action is based upon an accident insurance ticket. There was a verdict and judgment for the plaintiff. The defendant appeals.

Stiles & Lathrop, for appellant.

Wm. McNett and H. B. Hendershott, for appellee.

ROTHROCK, J.—The plaintiff purchased an accident insurance ticket of an agent of the defendant to go from Creston to Afton, Iowa, a distance of ten miles. Before the station at Afton was reached, and while the train was yet in motion, the plaintiff left his seat in the car in which he was riding, went upon the platform and took a position on the step, from which he was precipitated to the ground before reaching the passenger platform, and one of his feet was so injured, by being crushed by a wheel of one of the cars composing the train, as to require amputation. The action was brought to recover for loss of time at \$15 per week for twenty-six weeks, according to the terms of the insurance ticket. The accident policy or ticket contained the following clause: "Provided always that this insurance shall only extend to bodily injuries, fatal or non-fatal, as aforesaid, when accidentally received by the insured

1. INSUR-
ANCE: acci-
dent policy;
recovery on.

Bon v. The Railway Passenger Assurance Co.

while actually riding on a public conveyance provided by common carriers for the transportation of passengers in the United States or Dominion of Canada, and in compliance with all rules and regulations of such carriers and not neglecting to use due diligence for self protection." * * *

It must be conceded that it was incumbent on the plaintiff, in order to recover, to prove not only that he was accidentally injured while on his journey, but that he was at the time of the accident complying with the rules and regulations of the railroad company, and not neglecting to use due diligence for self protection. The Circuit Court instructed the jury to this effect, and no question is made as to the correctness of these instructions.

When the plaintiff rested his case the defendant moved the court to instruct the jury to return a verdict for the defendant upon the plaintiff's evidence. The motion was overruled and this ruling is assigned as error. To determine whether this motion should have been sustained, it will be necessary to give the substance of the evidence as introduced by the plaintiff up to the time the motion was made, and finally ruled upon. It appears from the evidence that as the train approached the station the whistle sounded and a brakeman called the name of the station. The train began to slow down and the plaintiff, seeing other passengers get up and walk out, arose from his seat, about five seats back in the car, and followed them out of the door upon the platform to get off. The steps of that car being occupied by a passenger, plaintiff stepped across upon the platform of the forward car, and stood upon the steps with his hands holding the railing preparatory to stepping off, and was followed upon that platform by another passenger. At this time the train had slowed down, as plaintiff says, to about two and a-half miles per hour, and as other of his witnesses say to from two to five miles per hour, when without warning the train gave a sudden start forward, whereupon the man in the rear of the plaintiff lost his balance, and falling against the plaintiff pre-

cipitated him from the steps, and in his fall his foot got under the wheel and was crushed. He fell at a point about twenty feet before reaching the passenger platform.

The foregoing is the statement of the evidence for the plaintiff as made by his counsel in argument, and in nearly the same language. That it is as favorable for the plaintiff as is justified by the record must be conceded. To this should be added the further fact that on the doors of the passenger coaches the following rule was inscribed upon a metallic plate: "Passengers are not allowed to stand on the platform." And the plaintiff himself as a witness on the stand testified that he was aware of this rule of the railroad company.

Conceding the foregoing statement of facts to be true was there such a failure of proof from the plaintiff's own showing as to require the court to direct the jury to return a verdict for the defendant? It will be observed that the rules of the company forbid passengers from standing on the platform. In its literal sense this would require them not to stand there whether the train was at rest or in motion, and it seems to us to be a reasonable requirement at all times. The platform of a car is a narrow passage for ingress and egress, and if crowded even while standing at a station it is an annoyance and inconvenience to those desiring to enter or leave the car. But in this case the train was in motion when the plaintiff went upon the platform. It is true the rule must receive a reasonable construction, and even while the train is in motion persons may rightfully pass from one car to another for proper purposes, such as going to and from a dining, smoking, or sleeping car, and the like. They are invited to do so by the agents and servants of the company, and by the manner in which trains are made up. But in so doing there would be no violation of the rule. The passenger in such cases does not *stand* upon the platform. The plaintiff's case is wholly different. He went upon the platform while the train was in motion, and some time before it arrived at

the regular stopping place. He stood with his feet upon the steps, which must be regarded as part of the platform, and holding the railing by his hands he awaited either the slowing up of the train or its arrival at the passenger platform, that he might alight. While in this position he received his injury. We think by his own statement that the accident happened while he was in plain violation of the rule under consideration, and because of such violation. It is urged that it is usual for travelers to go upon the platform of cars and get off before the train comes to a dead stop. Let this be admitted. Passengers also take fearful risks in boarding trains in motion, but we have yet to find any adjudged case where a passenger was allowed to recover damages by reason of personal injuries received in voluntarily, and without cause, alighting from or boarding an ordinary railroad train propelled by steam, and while in motion, unless it may be by the direction of the conductor or some one in authority. In such case the passenger must be held to take the risk upon himself, and make the peril his own. Under our statute he is guilty of a misdemeanor. Chapter 148, Laws 16th General Assembly. In *Hickey v. R. R. Co.*, 14 Allen, 429, it is said: "If the injury happen while the party is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care. But when the plaintiff's own evidence shows that he had left the place assigned for passengers, and was occupying an exposed position, he must necessarily fail unless he can also make it appear upon some ground of necessity or propriety that his being in that position was consistent with the exercise of proper care and caution on his part." Again it is said "Ordinarily no accident occurs to those who rush out of the train or into the cars at stations before the train fairly comes to a stop or after it is in motion again, but it cannot now be questioned that those who do so take upon themselves all the risks which attend such a practice." Citing *Garrett v. R. R. Co.*, 16 Gray, and *Lucas v. R. R.*

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Co., 6 Gray, 64; and *Sweeney v. R. R. Co.*, 10 Allen, 368. See, also, Redfield on Railways, Vol. 2, pp. 260-267 and cases cited.

It is said, however, that the plaintiff did not alight from the train while in motion, but that by the sudden starting up of the train he was jostled off by the passenger who stood behind him upon the platform. There is no claim that the engineer of the train knew that the plaintiff was in a perilous position, and after such knowledge was guilty of negligence in suddenly increasing the speed of the train. The plaintiff, whether he intended to alight from the train or not, by standing on the steps of the platform without any excuse or reasonable cause therefor did an act which he knew was in plain violation of a rule of the company, and thereby forfeited any right of recovery on the contract of insurance as expressed in the very terms of the policy.

It is true, as stated by counsel for plaintiff, that this is an unimportant case, the amount of recovery being only \$135. But we cannot adopt a rule which would authorize passengers by railway to crowd the platforms of moving cars and endanger each other's lives by hanging by the railings and upon the lower steps in a rush to alight from trains approaching stations, and in boarding outgoing trains, at the risk of life and limb. As is said in *Damont v. N. O. & Carrollton Railway*, 9 Louisiana Annual, 441, if a passenger "is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, and for this, his own gross imprudence, he can blame no one but himself." So in this case the plaintiff took the risk of standing upon the steps of the platform, and he should not be allowed compensation from any one for so plain a violation of a rule of the company, of which he was fully aware.

The jury should have been directed to return a verdict for the defendant.

REVERSED.

VAN GUILDER V. JUSTICE ET AL.

56 669
d95 733
56 669
d107 885
56 669
h129 603

1. **Dower: WHEN INCONSISTENT WITH DEVISE.** Where a will directed that the income from certain described real estate, left in trust to the widow of the testator, should be used for the benefit of certain minor children, between whom, on attaining their majority, the land was to be divided, it was held that the widow, while claiming under the provisions of the will, was not entitled to a distributive share in such land.

Appeal from Guthrie Circuit Court.

THURSDAY, OCTOBER 20.

THE plaintiff and defendants Emily and Eilen C. Van Guilder are heirs and devisees of David Van Guilder. The defendant Sarah A. Justice is the widow of said David. The plaintiff in this action seeks to have partitioned certain real estate devised to him and his sisters. Mrs. Justice claims she is entitled to a distributive share thereof, and asks the same be set apart to her. The court found for the plaintiff and entered a decree accordingly. Mrs. Justice appeals.

W. T. Dillon, for appellant.

C. A. & J. G. Berry and *McCaughan & Dabney*, for appellee.

C. S. Fogg, for minor defendants.

SEEVERS, J.—The facts are, David Van Guilder died in 1874 owning one hundred and twenty acres of real estate and some personal property, which he disposed of by will as follows: “First, I give and bequeath to my beloved wife the following described property, to have and to hold free from all claims.” Here follows a description of forty acres of the land and other provisions which need not be stated. “Second, that the following described lands * * * be held in trust and controlled

1. **DOWER:**
when inconsistent with
devise.

by my wife Sarah A. during the minority of the following named children, Emily, Austin, and Ellen C., the proceeds arising from the cultivation of said land to be appropriated for the equal benefit of said minor children, each of whom I desire to have an equal share in the above described property when or as they arrive at their majority." It is in this last real estate Mrs. Justice claims a distributive share as dower although she has accepted under the will and claims the benefit of all the provisions therein made for her. The question is whether she can take under the will and also have a share of the other real estate set apart to her as dower.

In support of the claim she can do so counsel cite *Corriell v. Ham*, 2 Iowa, 552; *Sully v. Nebergall*, 30 Id., 339; *Metteer v. Wiley*, 34 Id., 214, and *Watrous v. Winn*, 37 Id., 72.

When the two first cases were decided, the dower interest of a widow in the real estate of her husband was one third for life, and the devise in each case was that the widow should have a life estate in a portion of the real estate, and it was held she might have dower in the whole because the will was not inconsistent therewith.

The devise in *Metteer v. Wiley* was for life, but in *Watrous v. Winn* it was in fee. In both cases the real estate not devised to the widow was devised to certain children and it was held the widow could claim under the will and also have dower in the residue of the real estate, on the ground such claim was not inconsistent with the will.

In *Cain v. Cain*, 23 Iowa, 31, the devise was to the widow for life, but the testator directed that all his real and personal property be sold and after the payment of his debts the remainder to be divided among certain children. It was held the widow could not have one-third in fee as dower, because it would be inconsistent with the provision of the will directing a sale. It is intimated the rule might be different if the widow was only entitled to dower as at common law. In such case there might be a sale, subject to the dower right.

In the present case the land was devised to the widow in

Van de Haar v. Van Domseler.

trust during the minority of the devisees, and "the proceeds arising from the cultivation of the land to be appropriated for the equal benefit of said children." If the widow was entitled to dower at all she could have it admeasured very soon after the death of her husband. If she could do so the proceeds of the whole land could not be devoted to the purpose directed by the testator. Such a claim, therefore, would be inconsistent with the will. This case we think in principle is identical with *Cain v. Cain*, before cited, and is fully within the reason of the rule there adopted.

Counsel for the appellant has not cited Code, § 2452, nor is it claimed the said section should be considered in determining this case, because, as we suppose, the appellant prefers to retain the property devised to her rather than one-third of the whole of the real estate.

AFFIRMED.

VAN DE HAAR V. VAN DOMSELER.

56	671
1107	664
d107	685
56	671
d110	208

1. **Practice:** MOTION FOR NEW TRIAL: CONTINUANCE. It is not required that a motion for a new trial shall be determined during the term at which it is filed, and when not so determined it stands continued generally, without any record entry, and may be taken up at the next succeeding term.
2. **Pleading:** AMENDMENT: STATUTE OF LIMITATIONS. An amendment to a petition held to set up a new and distinct cause of action, which at the time the amendment was filed had become barred by the statute of limitations.

Appeal from Marion Circuit Court.

THURSDAY, OCTOBER 20.

THIS action was commenced in 1876, and the original petition filed at that time stated the plaintiff was an unmarried woman, and that "on or about the fifteenth day of February,

Van de Haar v. Van Domseler.

1875, the defendant * * did seduce and debauch her and have sexual intercourse with her," whereby she became pregnant and was delivered of an illegitimate child. For the cause of action just stated the plaintiff sought to recover damages. The defendant denied the allegations of the petition, and afterward there was filed an amendment to the petition, to which a demurrer was sustained. There was a trial by jury, verdict and judgment for the plaintiff. The defendant filed a motion in arrest and for a new trial, which was sustained. Both parties appeal.

John F. Lacey and W. I. Gesman, for plaintiff.

Stone, Ayres & Co., for defendant.

SEEVERS, J.—The verdict was returned into court at the November term, and on the 17th day of November, 1879. Judgment was on the same day rendered thereon, and on that day the defendant with leave of the court filed a motion in arrest of judgment and for a new trial. The amended abstract states the motion was "submitted to the court on November 20th, 1879," but the court record fails to show it was determined at that time, or that it was taken under advisement, or any disposition whatever made of it. On the succeeding day the court signed and there was filed a bill of exceptions, which, among other things, states "that immediately after the bringing in of the verdict * * the defendant filed a motion for a new trial * * which is made a part of the bill of exceptions, and the court being fully advised in the premises overrules said motion, to which ruling the defendant at the time duly excepted (it being agreed by the parties in open court at the time that if judgment be rendered or entered upon the verdict in the meantime this shall not be considered or held to be a ruling upon said motion, or a waiver of the right of the defendant under said motion); and this bill of exceptions is hereby made a

Van de Haar v. Van Domseler.

part of the record of this cause, and that this defendant nor his rights shall be in any manner prejudiced as far as the motion for a new trial is concerned by signing and filing of this bill at this time."

At the succeeding term in March, 1880, the following was entered of record: "Motion for new trial sustained by the court and verdict and judgment set aside, to which ruling the plaintiff at the time duly excepted."

I. Counsel for appellant insists the court erred in determining the motion at a term subsequent to that at which it was filed. The argument being that such motions must be decided at the term when filed; that the court has no discretion in the matter and cannot take such motions under advisement to be decided at a subsequent term unless the parties so agree. The argument leads to this result, the motion must be determined at the term when filed, whether the court is sufficiently advised or prepared intelligently to do so or not. This would be so although the motion was filed only five minutes before the court adjourned. In the absence of a statute so providing we are not prepared to so hold. The statute simply provides the motion must be filed at the term and within three days after verdict, and no provision is made when it shall be determined. It, therefore, stands like any other case or matter which is submitted to the court, and should be determined as soon as the court is "sufficiently advised in the premises." The statute provides: "Upon any final adjournment of the court all business not otherwise disposed of will stand continued generally." Code, § 172. When the court adjourned the motion was business pending, and as there was no agreement it might be decided in vacation, it stood continued until the next term by operation of law. No entry of record, stating it had been taken under advisement, was required in order to give the court power and jurisdiction to determine the motion at the succeeding term.

Van de Haar v. Van Domseler.

II. It is insisted the motion was overruled and finally determined at the November term, 1879, and therefore the court could not on its own motion sustain it at the subsequent term. If overruled at the time stated it is singular no entry was made of record to that effect. It is true the bill of exceptions states it was so overruled, but it also states it was agreed by the parties if judgment was rendered on the verdict the bill of exceptions should not be "considered or held to be a ruling upon said motion." Judgment was rendered on the verdict, and, therefore, the statement in the bill of exceptions the motion had been overruled should not be so regarded, and the defendant was not to be prejudiced by the bill of exceptions so far as the motion was concerned. It seems to us that while it might be said it is not free from doubt what the meaning of the bill of exceptions is, still we think the construction adopted is reasonable and correct. This conclusion is aided, we think, by the failure of the record at the March term to show the plaintiff then objected the motion had been determined at the previous term.

III. The amendment to the petition was filed with leave of the court at the March term, 1879, and is as follows:

2. PLEADING: "That she is an unmarried woman, and that
 amendment
 construed. on or about the fifteenth day of February, 1875, the said defendant suddenly came upon plaintiff while she was alone, and unprotected in the house, where she was living, in Mahaska county, Iowa; that previously to said date the said defendant had been engaged to be married to plaintiff, and by and through the engagement had obtained great influence and exercised great control over her, the said plaintiff, and ever since the termination of the said engagement the presence and appearance of said defendant where plaintiff was would frighten and unnerve her, cause her to lose control of herself, and her actions to a greater or less extent, and make her incapable, to a greater or less extent, of considerate action; that on or about the date above named defendant's appearance, sudden and unannounced, and while plaintiff was

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entirely alone in the house and unprotected, as above stated, and defendant's actions, while there, so frightened and unnerved her that she lost control of her will and actions, and became incapable of knowing what defendant was doing or about to do, or of offering or interposing any resistance to his acts.

"That while in said helpless condition, the said defendant did debauch and wrongfully have sexual intercourse with plaintiff, whereby she became pregnant and was delivered of a child, as in her said original petition alleged and stated."

As this amendment was filed with leave of the court, it was properly on file, as the defendant did not move to strike it from the files or except to the order granting leave. Such being the case the defendant, unless he was willing a default should be entered against him thereon, was bound within the time required by law to controvert the sufficiency of the petition. This he could do by motion, demurrer, or answer. He saw proper to demur on the ground the cause of action therein stated was barred by the statute of limitations.

If the filing of the amended petition should be regarded as the commencement of the action, as to the cause of action therein stated, the proposition that the bar of the statute was then complete is not controverted.

Upon the part of the plaintiff it is insisted the amendment sets up more specifically than the original petition the manner or means by which the sexual intercourse was obtained, and in legal effect is the same cause of action as that stated in the original petition and it relates back to the commencement of the action. This is probably true if the amended petition only contains a more full statement of the grounds upon which the original action is based; but is this so? The original petition states the defendant seduced, and by reason of the seduction had sexual intercourse with, plaintiff, whereby she was damaged. Seduction necessarily implies consent, or what is held to amount thereto, on the part of the female.

The amended petition states the intercourse was obtained

Chambers v. Watson.

by force and she never consented thereto. This amounts to a rape. There was but a single transaction, and it must have been either seduction or rape. It could not be both. If it was seduction a cause of action was sufficiently stated in the original petition. If the plaintiff was in doubt whether she was seduced or raped both could have been charged in separate counts of the petition. If both had been stated in the same count in the petition such a pleading could have been successfully assailed by motion or demurrer. This we think shows quite conclusively the two causes of action are not the same but separate and distinct. As there was but a single transaction there could be but a single cause of action; and as the charge of rape was made for the first time when the amended petition was filed such cause of action was barred and the demurrer correctly sustained.

It is unnecessary to determine the defendant's appeal. The plaintiff must pay the costs in this court.

AFFIRMED.

56 676
191 73

CHAMBERS ET AL. V. WATSON.

1. **Equitable Jurisdiction: REFORMATION OF WILL.** A court of equity has no power to reform a will devising real estate.

Appeal from Jasper Circuit Court.

THURSDAY, OCTOBER 20.

ACTION to recover possession of the northwest quarter of the northeast quarter and north half of northeast quarter of northeast quarter of section 25, township 78 north, of range 17 west of fifth P. M., and southeast quarter of southeast quarter of section 24, in same township, in Jasper county. The land was owned by one Peter Chambers, who died seized

Chambers v. Watson.

of the land, leaving the plaintiffs as his only heirs. They claim that they are entitled to the same by inheritance. The defendant claims the same as devisee of Peter Chambers, who died testate, and whose will has been duly probated. In the will the testator gave to the defendant Watson what he described as "all the interest in the following described real estate:

"Sixty acres Se 25 toon 7, } Jasper county,
Forty acres Se 24 toon 6. } State of Iowa."

The defendant in his answer set out the will and averred that the testator was not at the time of making the will or afterward the owner of any land in Jasper county, except the land in controversy, and that the land intended to be described was the land in controversy.

In a cross petition he set up the same facts, and asked that the will be reformed, and the description of the land corrected so as to cover the land in controversy. The plaintiffs demurred to the cross petition and the demurrer was sustained. From the ruling sustaining the demurrer the defendant appeals.

Smith & Wilson, for appellant.

Harrah & Meredith, for appellee.

ADAMS, CH. J.—That it is not the province of a court of equity to reform a will was held in *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674. A will devising real prop-

1. EQUITABLE
jurisdiction:
reformation
of will.

erty must not only be in writing, but must be executed with certain statutory formalities. If a court of equity could reform a will, and thereby give it an effect which it otherwise could not have, the court would give testamentary force to a mere intention regardless of the manner in which it is expressed. The demurrer to the cross petition seeking a reformation of the will, we think, was properly sustained. Whether the will by its own terms might not be held to operate as a devise of the land in controversy is an-

Chambers v. Watson.

other question that is to be determined by the meaning of the words, figures, and letters used in the description. It is not impossible that the description is such as the testator was accustomed to use to designate the respective tracts. We can hardly conceive that it was, but it is not for us to say that it was not.

A devise of a thing by any name, or to a person by any name, however different the name used in the will may be from the true name of the thing or person, is a good devise, provided that it be shown that the name used was one by which the testator was accustomed to designate the thing or person, and such showing may be made by parol. It is always competent to supplement the language of the will by parol evidence so far as is necessary to apply the language of the will to the object or person intended. Parol evidence is allowable too to explain a latent ambiguity. Whether the ambiguity is such in this case we need not determine. That question will arise perhaps upon the issue tendered by the answer.

The cross petition, upon which arises the only question now presented, seeks to change the will. It is true it does not seek to eliminate a plainly intelligible term as in *Fitzpatrick v. Fitzpatrick*, but it seeks something equally objectionable, and that is, to supply terms, without which the cross petition virtually confesses that the description is fatally defective.

The ruling in sustaining the demurrer is

AFFIRMED.

Hecht v. Dettman.

HECHT V. DETTMAN.

56	679
78	70
56	679
114	683
56	679
126	88

1. **Crops: WHEN NOT A PART OF REALTY: FORECLOSURE OF MORTGAGE.**

As between the purchaser of land at a foreclosure sale and a tenant of the mortgagor, the latter is entitled to crops grown by him which are matured at the time the sheriff's deed is executed, though not yet severed from the land.

Appeal from Cedar Circuit Court.

THURSDAY, OCTOBER 20.

ACTION of replevin. There was a verdict and judgment for plaintiff; defendant appeals. The facts of the case appear in the opinion.

F. C. James and Wolf & Landt, for appellant.

Piatt & Carr, for appellee.

BECK, J.—I. Two cases are presented together in this appeal. They involve the same facts and rules of law, and are between the same parties; they are therefore properly submitted together upon the same abstract. There is no dispute as to the facts, which are as follows: The property replevied is barley, cut and in shocks, and oats, being partly threshed and partly in bundles or sheaves, all upon the premises where it was grown. The defendant had rented the land of one Ehrke, who had previously executed two mortgages thereon, one, the senior incumbrance, to the New England Loan Company and the other to the plaintiff Hecht. After defendant had rented the land plaintiff foreclosed his mortgage, and on the 7th day of July, 1879, the time for redemption from the sale, as prescribed by the statute, having expired, a deed was executed by the sheriff. The other mortgage was foreclosed and the land was sold to one not a party to this transaction and the time of re-

1. CROPS:
when not a
part of realty:
foreclosure of
mortgage.

56 679
78 70

Hecht v. Dettman.

demption under the statute expired August 15, 1879, when a sheriff's deed was made. The foreclosure and sale under this mortgage cut off all claim or title held by plaintiff as well as by the mortgagor. Defendant continued in possession of the land up to the trial in the court below. At the time plaintiff received his deed the grain was not cut, but it was mature and ready for harvesting before that day. Rainy weather had prevented the defendant from cutting the grain before plaintiff's deed was executed. The court instructed the jury that the title of the grain passed to plaintiff by the sheriff's deed and directed a verdict for plaintiff. We are required to determine whether this view of the law be correct.

II. The sheriff's deed executed upon the foreclosure sale vested plaintiff with the title of the land, and the right to all growing crops followed the title thus acquired. *Downard v. Groff*, 40 Iowa, 597.

This rule, we think, is not applicable to grain which has matured and is ready for the harvest. It then possesses the character of personal chattels, and is not to be regarded as a part of the realty. See 1 Schouler's Personal Property, 125, 126; Bingham on Sales of Real Property, 180, 181.

This conclusion is well supported upon the following reasons: The grain being mature, the course of vegetation has ceased and the soil is no longer necessary for its existence. The connection between the grain and the ground has changed. The grain no longer demands nurture from the soil; the ground now performs no other office than affording a resting place for the grain—it has the same relations to the grain that the warehouse has to the threshed grain or the field has to the stacks of grain thereon. It will not be denied that when the grain is cut it ceases to be a part of the realty. The act of cutting, it is true, appears to sever the straw from the land. But it is demanded by the condition of the grain. It is no longer growing; it is no longer living blades which require the nourishment of the soil for its existence and de-

Hecht v. Dettman.

velopment. It is changed in its nature from growing blades of barley or oats to grain mature and ready for the reaper. Now the mature grain is not regarded by the law like the growing blades, as a part of the realty, but as grain in a condition of separation from the soil.

Suppose the defendant had cut a part of the seventy-two acres of grain in controversy; the grain so cut, it will not be denied, would not have passed to plaintiff. There is no valid reason why the act of cutting should change the property in the grain. The work required time and therefore plaintiff loses a part of his property. All of the grain is in the same condition, all ready for the reaper. The part cut is his property, while the part uncut belongs to the land owner. We think the ownership of the grain should be determined by its condition, not by the act of cutting, which cannot be done as soon as it is demanded by its condition. We conclude that for the reason the grain was mature and was uncut because defendant has been unable to do the work, it cannot be regarded as part of the realty which passed with the deed to plaintiff.

III. Counsel for defendant insist that as defendant was in the adverse possession of the land the action of replevin will not lie to recover the grain. We find it unnecessary to determine the question thus raised, as we hold that defendant's right of property in the grain accrued when the grain matured, whether he did or did not hold adversely to the plaintiff after the sheriff's deed was executed.

The judgment of the Circuit Court must be

REVERSED.

ON REHEARING.

ROTHROCK, J.—A petition for rehearing was granted in this case not because any member of the court doubted the correctness of the principle involved in the opinion, but because the question as to when a crop ceases to be a part of the realty was not discussed in the original arguments of counsel.

Hecht v. Dettman.

The arguments on the question which have been submitted on the rehearing are able and exhaustive. Without reviewing the authorities cited in argument we deem it sufficient to say that we still believe the opinion to be correct in principle, and it is well supported by authority. It is not to be denied there are adjudged cases, in courts entitled to the greatest respect, which hold that upon a sale of real estate all crops standing upon the ground and not severed from the soil, whether ripe or unripe, pass with the land. These are cases, however, between vendor and vendee, where the interest in the land and crop is united. There seems to be a distinction in favor of a tenant. In Washburn on Real Property, pp. 4 and 5, it is said: "Growing crops planted by the owner of the soil constitute a part of the realty, but if planted by a tenant who holds under the owner of the soil, and the same are fit for harvesting, or by one whose tenancy is for an uncertain period of time, annual crops are regarded as personal property, liable to become part of the realty if the tenant voluntarily abandons, or forfeits possession of, the premises. Growing crops standing upon the soil when the latter is conveyed pass as part of the realty if planted by the grantor."

The rule we adopt as applicable to the facts of this case is manifestly just. Dettman was warranted in the belief that, according to the seasons, and the course of nature, his grain would be harvested while he yet had the right to harvest it. So far as the ripening of the grain was involved it met his just expectations. But by reason of unfavorable weather he was unable to sever it from the ground before the title passed to Hecht. Having sown in peace, and in a just belief that he could rightfully reap, we think he should have been permitted to do so. The former opinion is adhered to.

ROBERTS V. HAMILTON.

1. **Res Adjudicata:** DISMISSAL FOR WANT OF JURISDICTION. A judgment dismissing an action for want of jurisdiction is not an adjudication which can be pleaded in bar of another action in a proper tribunal.
2. ———: **FACTS CONSIDERED.** A plea of former adjudication held erroneously sustained.

Appeal from Decatur District Court.

THURSDAY, OCTOBER 20.

ACTION AT LAW. A demurrer to defendant's answer was overruled, and, plaintiff standing on his demurrer, judgment was rendered for defendant. Plaintiff appeals.

Bullock & Hoffman, for appellant.

Harvey & Young, for appellee.

BECK, J.—I. The petition alleges as a cause of action that defendant sold to one Priest certain fences, agreeing to warrant the title thereto and to pay Priest all costs and damages which he might sustain by removing them. Under this sale and agreement Priest took the fences and converted them to his own use. Thereupon plaintiff brought an action against Priest for the value of the fences and recovered judgment therefor and for costs. Pending this action Hamilton was made a defendant therein and judgment rendered against him as well as Priest for the damages and costs accruing after defendant was made a party to the action, but judgment was rendered against Priest alone for costs accruing before that time, amounting to \$279. The petition shows that Priest authorized plaintiff to pay the costs and assigned to plaintiff his cause of action against the defendant for the cost, which plaintiff has paid. Other averments of the peti-

 Roberts v. Hamilton.

tion need not be recited. In this petition defendant answered, setting up the following defenses:

"1st. That the cause of action was fully adjudicated in a suit brought by plaintiff in the Circuit Court against defendant.

"2d. That the cause of action was also fully adjudicated in an action wherein the judgment was rendered, which divided the costs, adjudging a part to be paid by Priest and defendant, and the balance, \$279, to be paid by Priest alone."

Demurrers to the answers were overruled.

II. The answers of the defendant show the facts upon which these pleas of former adjudication are based to be as

1. RES ADJUDICATA: dismissed for want of jurisdiction.

follows: The suit in the Circuit Court as disclosed by the petition was based upon the identical cause of action set up in the petition in this case. The defendant demurred to the petition in that action on the ground that, as plaintiff claims to recover for costs in an action pending in the District Court, the Circuit Court has no jurisdiction; the plaintiff's only remedy, if he has any, is by motion in the District Court to retax the costs. This demurrer was sustained.

It is very plain that the adjudication upon the demurrer did not go to the merits of the case. The sole question decided pertained to the jurisdiction of the court and not to plaintiff's right to recover upon his petition. The demurrer did not challenge plaintiff's right to recover in the proper forum; it simply put in issue his right to recover in the Circuit Court. What is said in the demurrer in regard to the remedy being by motion to tax costs is a mere matter of argument. The court was not authorized to adjudge that no other remedy could be pursued. It decided that it did not possess jurisdiction of the case; no other issue was raised by the demurrer. We conclude that plaintiff's demurrer to the answer of defendant setting up an adjudication in the Circuit Court ought to have been sustained.

Roberts v. Hamilton.

III. The second plea of former adjudication is equally defective. It alleges that the District Court in the original action divided the costs, which amounted to an adjudication that each party should pay the amount assessed against him. But there was really no division of costs. The court simply held that defendant should be liable for the costs incurred after he became a party to the action. Priest was held liable for costs incurred before that time. But plaintiff's cause of action is based upon a contract made between Priest and the defendant, to the effect that defendant should pay Priest all costs incurred by him in the prosecution of this suit. There was no issue in the case between the parties as to the costs. The judgment for the costs now in question did not go against defendant for the reason that they were incurred before he became a party to the action. The rights of the parties under the contract of defendant to pay all costs were not involved in that action and no adjudication was had thereon. The demurrer to the second plea of prior adjudication ought to have been sustained.

No question was raised in the court below or in this court in regard to plaintiff's right to recover upon the cause of action set out in the petition. We are not, therefore, permitted to consider such question. The judgment of the District Court must be

REVERSED.

Jordan v. Walker.

JORDAN V. WALKER.

1. **Pleading: ISSUES RAISED BY: FORCIBLE ENTRY AND DETAINER.**

Where in an action of forcible entry and detainer, before a justice of the peace, the petition does not set up title in the plaintiff, an answer denying plaintiff's title and averring title in the defendant is not responsive to the petition and does not raise an issue involving the title to the property which requires the removal of the action to the Circuit Court.

Appeal from Wapello Circuit Court.

THURSDAY, OCTOBER 20.

THIS is a proceeding upon a writ of error issued by the Circuit Court, upon the petition of defendant, to a justice of the peace to review his decisions in an action of forcible entry and detainer wherein judgment was rendered for plaintiff. Upon the return of the writ of error, the judgment of the justice was affirmed. Defendant appeals. The cause has before been in this court. See 52 Iowa, 647.

John S. Walker, appellant, *pro se*.

W. W. Corey and *John B. Ennis*, for appellee.

BECK, J.—I. The judgment of the Circuit Court upon the former appeal was reversed and the cause was remanded. The Circuit Court entered judgment in accord with the decision of this court, and sent the cause to the justice of the peace from whom it was brought upon writ of error, for a new trial, which was accordingly had upon the original pleadings filed in the case and an amended answer of the defendant. Upon this trial a verdict was had for plaintiff and judgment rendered thereon. The cause was again removed to the Circuit Court upon a writ of error. The petition for the writ complains of many errors, some of them alleged to have occurred in the admission of evidence, others in the refusal to grant a continuance, and in the overruling of a motion to transfer the

cause to the Circuit Court, and others again relate to matters that are not clearly set out in the abstract. The confusion and imperfections of the abstract render it almost unintelligible, and we are therefore unable to determine positively what questions involved in these alleged errors were passed upon by the Circuit Court. In view of the fact that the same errors are not all urged in this court, it becomes unimportant to unravel the intricacies of the abstract in order to discover all the points decided by the Circuit Court.

And defendant's abstract again fails in that it does not disclose certain rulings of the Circuit Court of which he complains in his assignment of errors. But here again defendant permits us to escape from what would seem to be a hopeless task of determining just what the court below did decide, by omitting to discuss in his argument the errors assigned upon the hidden rulings of the court. The only question discussed by counsel is this:

Was the title to the real estate in question involved in the action before the justice of the peace, so that he had no jurisdiction to try the case?

This question is presented in many different shapes in defendant's assignment of errors, and is discussed, and nothing else, in the twenty points of his argument. The protean qualities of which the question partakes in the skillful hands of defendant does not conceal its true character. In all its numerous forms the question discussed, as we have above stated it, plainly appears. We discover in the abstract that this question was decided by the court below; as counsel on both sides in effect so admit there can be no mistake upon this point. It is the only question we are called upon to decide upon this appeal.

II. The pleadings in the case upon which the first trial was had before the justice of the peace fully appear in the opinion announcing our decision upon the former appeal. See 52 Iowa, 647. We need not reproduce them here. After the case had been re-

1. PLEADING :
issues raised
by forcible
detainer :

Jordan v. Walker.

manded to the justice, and before the second trial in the justice's court, defendant filed an amendment to his answer, alleging "that he is the owner in fee simple of the real estate described in plaintiff's petition, * * * * * ; that he denies that plaintiff has any kind of right or title to the same, as shown in defendant's answer, amended answer and motion to dismiss and motion to transfer." Thereupon defendant filed a motion "that the action be transferred to the Circuit Court * * * * * for the reason that the title to the real property in question is now directly put in issue by his amendment to his former answer herein on file and as by law provided." The motion was overruled, and the decision of the justice was affirmed by the Circuit Court. This ruling is the foundation of defendant's objection, raised by the only question discussed by him upon this appeal as above stated.

III. It may be admitted that if the question of title was raised by the pleadings the justice had no jurisdiction of the cause, and he should, upon defendant's motion, have transferred it to the Circuit Court. Code, § § 3535, 3620.

Did the pleadings in the case raise the question of title?

We held upon the former appeal that neither the petition nor answer, as these pleadings then appeared, presented a question of title. We are now required to determine whether the amendment to defendant's answer filed at the second trial before the justice, which we have above quoted, raises the question of title. We have before stated that this amendment constitutes the only change in the pleadings. It simply avers that defendant holds the fee simple title to the property and denies that plaintiff holds the title.

The denial of plaintiff's title is not responsive to the petition, for, as we have held in our former opinion, the petition does not set up title. No issue of title was presented by this denial. The averment that defendant holds title is not of facts showing title in him, but of a conclusion of law. As it is an amendment to the answer, it must be read and understood as part of the original pleading which it is intended to amend.

Laverenz v. The C., R. I. & P. R. Co.

Considered as a part of the original answer, if of any effect it must be understood to aver that the defendant claims title under the facts alleged in his answer, that he holds the title based upon the facts pleaded by him. But we held upon the former appeal that defendant's answer did not plead facts supporting his claim to the possession of the property. We therefore reach the very obvious conclusion that the justice of the peace was not deprived of jurisdiction by reason of defendant's amendment to his answer, and that the motion to transfer the case to the Circuit Court rightly affirmed the decision of the justice.

Here the case ends. It would be an unauthorized and unprofitable task to attempt to follow defendant in his argument and reply to his numerous positions. The endeavor would lead us to consider the facts of the case as presented in his argument, many of which are not found in the record and a still greater number have no bearing upon the only question involved in the case. The judgment of the Circuit Court is

AFFIRMED.

LAVERENZ V. THE C., R. I. & P. R. CO.

1. **Railroads: PERSONAL INJURY: CONTRIBUTORY NEGLIGENCE.** The rule is that, as a matter of law, a person voluntarily going upon a railway track at a point where there is an unobstructed view of the track, and failing to look or listen for danger, cannot recover for an injury which might have been avoided by so looking or listening; but when the view is obstructed, or other facts exist which tend to complicate the question of contributory negligence, it becomes one for the jury.
2. —: —: —. Evidence considered and held to sustain a finding that a person who was killed while walking on the track of a railroad was not guilty of contributory negligence precluding a recovery by his administrator.

56	689
84	333
56	689
91	250
56	689
112	161
56	689
120	118

Appeal from Scott District Court.

FRIDAY, OCTOBER 21.

THIS is an action to recover damages for a personal injury resulting in the death of James Fisher, plaintiffs' intestate, at Wilton, Iowa, in the month of August, 1877. There was a trial by jury and verdict and judgment for the plaintiff. Defendant appeals.

Cook & Dodge, for appellant.

Bills & Block, for appellee.

ROTHROCK, J.—I. The action was commenced in the Circuit Court of Scott county, and at the March term, 1879, upon a trial, the jury returned a verdict for the plaintiff for the sum of \$5,000. A motion for a new trial was sustained by the court upon the ground that it appeared from the evidence that said Fisher was guilty of such contributory negligence as to preclude any right of recovery. At the June term, 1879, of said court the cause was again tried and a verdict was returned for the plaintiff for \$6,000. A motion to set aside the last named verdict was also sustained. From the order setting aside the verdict and granting a new trial the plaintiff appealed to this court, and the judgment of the Circuit Court was affirmed (see 53 Iowa, 32). When the cause was remanded to the Circuit Court the venue was changed to the District Court of Scott county. The cause was tried in that court, resulting in a judgment for the plaintiff in the sum of \$6,000, and from this judgment the present appeal was taken.

To the end that the questions discussed by counsel may be fairly understood, it is necessary to give a brief statement of what we regard as undisputed and material facts in the case.

James Fisher, the plaintiff's intestate, was a farmer and dealer in live stock, and resided in Kansas. On the 27th of

August, 1877, the defendant entered into a contract with one Ward to transport four car-loads of hogs from Atchison, Kansas, to Chicago. Fisher signed the contract for Ward, and by the terms of the contract Fisher was to be transported by the same train without charge, to take care of the stock. The train arrived at Wilton, Iowa, on the afternoon of August 23. The southwestern branch of defendants' road here forms a junction with the main line, and in accordance with the usual custom a new train was made up by changing the engine and caboose car, and parties in charge of stock were required to take passage in another caboose from that used on the southwestern branch. There was a delay at Wilton of from twenty to twenty-five minutes. The train which was made up to go east consisted of some twenty-three or twenty-four cars, and when made up ready to start the engine stood fronting east and from 160 to 175 feet west of the freight depot and the train extended back west, the caboose being the last car on the west end. Some five minutes, or a very short time before the train started, Fisher was in the trainmaster's office in the depot making complaint of the slow time made in transporting the stock in his charge. From the freight depot running west there are four railway tracks nearly parallel, and from seven to nine feet apart. The main track was immediately next to the depot platform on the north. Next to that was another track on which was Fisher's train about to start east. North of that was the third track, and at the west end of the depot the fourth track branched off on the south side. A switch or cross track started from the main track near the west end of the depot, and crossed to the next track on the north. It was not customary for this train to stop so as to bring the caboose to the platform, and parties desiring to ride on the train were expected to walk back to the caboose. About the time, or before the train started, Fisher left the depot platform apparently on his way to the caboose. He was compelled to cross the main track and may have crossed some of the other tracks. He was seen, however,

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walking down west in the space between the main track and the track on which his train was about to pull out. This space was about seven feet nine inches wide between the rails of the two tracks. As he walked down this space toward his train, the engine was approaching him on an up grade, laboring heavily, making a loud noise by steam escaping from the top, and as the evidence tends to show from the open cylinder cocks. As he approached the engine he left the space in which he was walking and went upon the main track, and walked on west. The engine which pulled in the train on the branch road had been switched over on the main track, and about the time Fisher started for his train this engine was at a water tank some distance east of the depot. It backed down to the depot and came to a stop, or nearly so, and took on two men, employes of the road. The speed of this engine was increased, and it backed west on the main track, and as Fisher walked upon that track he was struck by the end of the tender in the back and knocked down and the engine passed over him lengthwise, and he was found dead upon the track, having been crushed by the ash-pan of the engine, as is supposed. These are leading facts and about which there is no real dispute. It is impossible in an opinion of ordinary length to recite all the facts and circumstances which enter into a case of this kind, and which have much to do in determining the rights and obligations of the parties. Other facts will, however, be noticed in determining the questions in the case.

It does not appear to be seriously questioned that the jury were warranted in finding that the defendant was negligent in backing the engine upon the deceased. Indeed, taking into consideration the fact that Fisher was a passenger upon the train, and was expected to board the caboose by crossing the main track at least, that the engine was backed with such speed as to overtake and throw him upon the track and crush him without being seen by those in charge of the engine, and the further fact that there was evidence tending at

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least to show that the person in charge of the engine as engineer was incompetent to properly manage an engine, we think we would be weakening the rule holding the carrier of passengers to the highest degree of care if we should determine that there was no warrant in the evidence for finding that the employes of the defendant were negligent.

II. The main question in the case, and that upon which counsel for appellant with confidence rely for a reversal, is the alleged contributory negligence of the deceased. It is said that because the deceased when he stepped upon the main track did not look to see if the track was clear, and because he walked thereon without looking for an approaching train or engine, and while thus walking thereon was killed, his representative cannot recover. We are required to determine whether or not under the facts and circumstances surrounding the deceased the court below should have determined as a question of law that the plaintiff was not entitled to recover because of contributory negligence. If the plaintiff had not been killed and had brought an action for injuries inflicted, under the circumstances of this case, and it had been shown without conflict or dispute, either by his evidence or otherwise, that he started for the train after it was in motion, that he crossed the main track and entered upon the space between the tracks and was proceeding to the caboose when he met the engine, that he was not confused by the noise and discharge of steam from the top and the cylinder of the engine; that he had ample room to pass the engine by keeping in the space between the tracks without being burned or annoyed by the escaping steam; that he knew if he crossed over the rail to the south of him he would be upon a track and that with such knowledge he voluntarily went upon the track without either looking or listening for danger; there would be much reason for holding that as a matter of law he could not recover. It is true that where a person voluntarily goes upon a railroad track, where there is an unobstructed view of the track, and fails without

1. RAILROAD :
personal in-
jury : con-
tributory
negligence.

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excuse to look or listen for danger, as matter of law he is not entitled to recover. He must take the chances of injury from an approaching train upon himself, unless the persons in charge of the train see his danger in time to avert it. *Oarlin v. C. R. I. & P. R. R.*, 37 Iowa, 316; *Benton v. Central R. R. of Iowa*, 42 Iowa, 192; *Lang v. Holiday Creek R. Co.*, 49 Id., 469; *Artz v. C., R. I. & P. R. R. Co.*, 34 Id., 153. In the last case a large number of authorities are cited upon the question as to when contributory negligence becomes a matter of law. In that case it is said that "if the view of the railroad as the crossing is approached on the highway is obstructed by any means so as to render it impossible or difficult to learn of the approach of a train, or there are complicating circumstances calculated to deceive or throw a person off his guard, then whether it was negligence on the part of plaintiff, or the person injured, under the particular circumstances of the case is a question of fact for the jury." See, also, *Moore v. Central R. R. of Iowa*, 47 Iowa, 688; and *Farley v. C., R. I. & P. R. R. Co.*, ante, 337. These and many other cases which might be cited establish the doctrine beyond question that a person is not necessarily and as a question of law negligent in going upon a railroad track without looking and listening for approaching trains. Apply this rule to the case at bar and we think it was a question of fact for the jury under all the circumstances to determine whether the deceased was guilty of such negligence as to preclude a recovery. There were many circumstances proper for the consideration of the jury in determining the question. Some of these may be mentioned. The space between the tracks where the deceased was walking was about seven feet nine inches wide. About two feet of this distance was occupied by the parts of the engine and train which projected over the track. How much more was obstructed, so to speak, by escaping steam does not appear. The tracks of the switch were near where the deceased was walking. It was very proper for the jury to determine whether a person

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under these circumstances might not in the exercise of proper prudence step upon the main track without even being aware that he was upon a track. In determining this the noise and confusion, the network of tracks, the fact that the train was about to leave him behind, and other circumstances, were proper subjects for consideration.

It is urged with great earnestness that the deceased had ample opportunity to board the caboose before the train 2 —: —: started, and that he was guilty of negligence in crossing the tracks and walking along them after the train was in motion. The deceased was required to change cars. He was rightfully and properly at the depot. He was not required to go into the yard to get into the caboose while the train was being made up. It does not appear that the train had started when he left the depot. The engineer of the train testifies that when he saw Fisher, and when the accident happened, he "had just hooked on the train and started. The engine had only made two or three revolutions." No call was given to passengers that the train was about to leave. In the language of the engineer they just hooked on and started, and the jury, we think, may fairly have found that Fisher was in the space between the tracks before any attempt was made to start the train.

III. With the general verdict, the jury returned certain special findings of fact which were submitted to them at the instance of the defendant. They are as follows:

"1st. Had the decedent, James Fisher, on several occasions previous to the day when he was killed, passed through Wilton on defendant's railroad by freight or stock trains, and changed caboose car at that place? Yes.

"2. Did the said James Fisher, when he arrived at Wilton, on the day when he was killed, know, or have reason to believe, from his previous experience in changing cars at Wilton, that he would be obliged to go some distance west of the depot platform at Wilton, in order to get upon the ca-

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boose car, to proceed on his journey eastward? We cannot tell.

"3d. Was the caboose car in which said James Fisher was to go east from Wilton shown to him by one of defendant's employes in time for said Fisher to have gone to said caboose car before the train started? Yes.

"4th. Did said James Fisher know, by his experience and observation at Wilton on previous trips, that engines and cars were liable to pass along any one of the several tracks of defendant north of the depot at Wilton while the freight or stock train for the east was being made up west of the depot building? We cannot tell.

"5th. Did the said James Fisher step from the space between the tracks upon the main track of defendant's railroad, and walk lengthwise thereon, without looking to see if any engine or car might be approaching him from behind? We do not know.

"6th. If, at or just before the time said James Fisher stepped upon the track, he had looked to see if an engine or car was approaching him from behind, could he have easily avoided being struck by the engine which ran over him? No."

Upon the return of the verdict and the answers to the special interrogatories the defendant objected to the answers to the interrogatories numbered two, four and five as being insufficient, and objected to the receiving or recording of the verdict without an answer to said interrogatories. The objection was overruled.

It is insisted that if truthful answers had been made to these questions according to the evidence the general verdict must have been for the defendant. We do not think that if the second and fourth questions had been answered in the affirmative that the answers would have been inconsistent with the general verdict. The fact that Fisher knew the place of boarding a caboose, and knew that engines and cars

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were liable to pass along the tracks of the railroad, would not be conclusive upon the question of his negligence.

It is insisted that the evidence conclusively shows that Fisher went upon the main track without looking to see if any engine or car might be approaching him from behind, and that therefore the answer to the fifth interrogatory should have been in the affirmative. This would not have been necessarily in conflict with the general verdict, because, as we have seen, it was for the jury to determine whether he was chargeable with negligence for not looking.

The answer to the sixth interrogatory does not appear to us to be supported by the evidence unless the jury found that "at or just before" Fisher stepped upon the track the engine was stopped at the platform to take on the two men. If he had looked and it appeared to be standing there he would not have seen an engine or car approaching him, and would not have apprehended the necessity of avoiding it. However this may be, an answer in the affirmative would not have controlled the general verdict, because, as we have said, it was for the jury to determine whether or not proper care and prudence required him, under all the circumstances, to look for the approach of an engine or cars.

IV. Some objection is made to the refusal to give an instruction asked by defendant, and to certain instructions given by the court to the jury. We have carefully examined the questions made thereon, and without setting them out here we may say that we find no error in the rulings of the court in this regard. These questions involve no principle of general interest, and as this opinion has already been sufficiently extended we must omit their discussion in detail. We are united in the conclusion that the judgment should be

AFFIRMED.

McCUE V. THE COUNTY OF WAPELLO.

56	698
90	52

56	698
120	51
122	756

56	698
125	486
135	488

56	698
131	331

1. **Practice:** FINDING: PRESUMPTION OF REGULARITY. Findings of fact or law made by a court will be presumed to have been made in compliance with the provisions of the statute authorizing such findings, unless the contrary is shown.
2. **Public Officer:** OFFICER DE FACTO: RIGHT TO FEES. The rule of law recognizing an officer *de facto* in discharging the duties of the office is for the benefit of the public, and does not extend to controversies between him and the officer *de jure*, as against whom he must be considered an intruder and not entitled to claim the emoluments of the office, the right to which is dependent upon the right to its possession.

Appeal from Wapello District Court.

FRIDAY, OCTOBER 21.

ACTION at law to recover for services rendered by plaintiff as sheriff of the defendant county. The cause was tried to the court without a jury and judgment rendered for plaintiff. Defendant appeals. The facts of the case appear in the opinion.

Moore & Hammond, for appellant.

William McNett and *H. B. Hendershot*, for appellee.

BECK, J.—I. The petition alleges that plaintiff between the 19th day of September, 1878, and the 7th day of April, 1879, was acting sheriff of Wapello county, and, in the discharge of his duty as such officer, he rendered certain services and expended certain sums of money, for which, together with an amount due him as salary, he seeks to recover in this action. The answer denies the allegations of the petition and avers the facts connected with plaintiff's claim to be substantially as set out in the finding of the court, which will hereafter appear. It further alleges that plaintiff performed the services and made the expenditures sued upon as deputy of the sheriff of the county, and that whatever claim he has therefor should

McCue v. The County of Wapello.

be made against and adjusted with the sheriff for the services and outlay in question. Upon the issues thus presented the cause was tried to the court.

II. The plaintiff filed an amended abstract setting out the facts and conclusions of law found by the District Court, 1. PRACTICE: finding: presumption of regularity. which defendant moved to strike for the reason that neither of the parties requested the court to make such findings. In support of this motion counsel for defendant insist that, to authorize the court to find specially the facts and conclusions of law, a request therefor must be made at least by one of the parties to the action. This position is based upon Code, section 2743. For the purposes of this case we may admit, without, however, so deciding, that this position is correct. But as the court has made the finding, in the absence of a contrary showing in the record, we will presume it was done in pursuance of the request of one of the parties. Acts of the court of this kind done in the progress of a case are presumed to be in accord with the law. Presumption as to the regularity of the proceedings of courts will always be exercised; errors in such proceedings must always be affirmatively shown. Under these familiar rules we must regard the findings of the court as authorized by the statute, even if it bear the construction insisted upon by defendant's counsel. The motion must be overruled.

III. The findings of the court are as follows:

"1st. I find that at the general election, held in 1877, D. W. Stewart was elected to the office of sheriff of Wapello county, Iowa; that at the proper time he qualified as such officer and entered upon the duties of said office; that he appointed as his deputies the plaintiff, W. D. McCue, and Q. A. Wood, who each qualified as such deputies and each entered upon the discharge of the duties of deputy sheriff. The duties of said Wood were confined mostly to the care of the jail, and the prisoners confined therein; and the duties of the plaintiff were confined mostly to the service of processes, etc.

"2d. That at the August term, in 1878, of the District

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Court of said county, the grand jury presented an indictment against the sheriff, D. W. Stewart, charging him with the crime of extortion, and the court, on the 19th day of September, 1878, suspended him from office under section 756 of the Code.

" 3rd. That at the time the court suspended Stewart from office it appointed the plaintiff to the same office, for the balance of the term, under section 753 of the Code.

" 4th. That said plaintiff at once entered upon the duties of the office, took possession of the books and papers pertaining to the same; took control of the jail and prisoners therein, the said Wood continuing to act as jailor, but under the direction of the plaintiff.

" 5th. That D. W. Stewart, after his suspension from office by the court, did not perform or attempt to perform any of the duties pertaining to said office from the 19th day of September, 1878, to the 1st day of March, 1879.

" 6th. That on the 11th day of October, 1878, the board of supervisors of Wapello county appointed Thomas Bedwell sheriff, in the place of Stewart, suspended. Said Bedwell qualified and performed some of the duties of the office.

" 7th. That the plaintiff, after his appointment by the court, to the time of the appointment of Bedwell, performed, either by himself, or others acting under him, including Wood, the jailer, all of the duties of the office; that said Wood recognized the plaintiff as sheriff and took his instructions from him.

" 8th. That after Bedwell was appointed by the board the plaintiff denied his authority to act as sheriff, and retained possession of the books and papers of the office and the control of the jail, and continued to perform the duties of sheriff, under a claim of right; that Bedwell had at no time, charge of or control over the said books and papers, or the jail, or the prisoners confined therein.

" 9th. That said Bedwell or no other person commenced any action against plaintiff, to determine his right to the of-

McCue v. The County of Wapello.

fice. But said Bedwell did petition the Circuit and District Courts when in session, to recognize him as the sheriff instead of McCue; that the Circuit Court did so recognize him as sheriff during most of the October term, 1878, of said court. But the District Court at the January term, 1879, refused to recognize Bedwell as sheriff, but recognized the plaintiff, who seemed to be in the possession of the office under a claim of right, and had the custody of the books and papers belonging to the office, and the control of the jail, and the prisoners confined therein.

“10th. That the plaintiff performed most of the duties of the office during the time aforesaid, from the 19th day of September, 1878, to the 1st day of March, 1879, publicly, openly, and under a claim of right to the office; that he performed many of said duties at the request of public officers and the court; that in whatever he did he acted in good faith, and claimed the right to the office, and to perform its duties, under the advice of able attorneys.

“11th. That the defendant had knowledge of his claim, and the board of supervisors audited and allowed bills presented by him for such services to the amount of \$1,000 or more, about \$400 of which was for dieting prisoners, sent to prison by the city authorities.

“12th. That on the 1st day of March, 1879, the said District Court vacated the order of suspension, holding that the record did not show authority to make it, and restored Stewart to the office of sheriff.

“13th. That during the time the order of suspension was in force Stewart took no appeal from it, and that he performed none of the services, directly or indirectly, for which the plaintiff claims compensation.

“14th. That Stewart, after the order of suspension was revoked, presented a claim to the board of supervisors for dieting prisoners, which embraced the same charges presented by plaintiff for such services; that the board allowed Stew-

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art's claim, but at the same time had knowledge that plaintiff claimed pay for such services.

"15th. That Stewart had no legal claim against the county for said services, and the payment by the board to him is no bar to plaintiff's claim.

"16th. That the plaintiff expended in dieting prisoners, and expenses connected with the jail, and incurred in the discharge of the duties of sheriff, from \$1,000 to \$1,200.

"17th. That the plaintiff, during the time aforesaid, was sheriff *de facto*; that he performed said services under a claim of right, in good faith, and was not a mere intruder in said office.

"18th. That the claims sued upon were duly presented to the board of supervisors for allowance, and the board refused to allow them, before this suit was brought."

It will be observed that the fifteenth, sixteenth, and seventeenth findings presents conclusions of law. The court also found as a conclusion of law "that the plaintiff is entitled to compensation for all services actually rendered to the public, and for such services he should receive the fees provided by law and paid to the sheriff for like services." Other conclusions of law found by the court relate to the amounts found due the plaintiff upon the several items of his account; they need not be presented here.

The evidence shows without conflict that after the order for the removal of Stewart, no change was made in the business of the office, except that Stewart performed no duties connected with the office though he continued about the sheriff's office. The plaintiff continued to use the horses and vehicles owned by Stewart and used by him and his deputies in official services. Some provender bought by Stewart and on hand at the time of his removal was used by plaintiff. No compensation was paid Stewart for the use of the horses or for the provender. The testimony shows without conflict that plaintiff apprehended trouble from Bedwell alone, whose

 McCue v. The County of Wapello.

claim to the office he successfully resisted, and it may be found that in this he was assisted by Stewart.

IV. The order suspending Stewart from the office of sheriff was at a subsequent term revoked on the ground that it was made "without authority." This revocation stands as an adjudication binding upon all parties concerned. If the order was made "without proper jurisdiction or authority," and it is so declared in the judgment setting it aside, it is void. If void Stewart never ceased to be sheriff. He was the sheriff *de jure* while plaintiff as sheriff *de facto* was discharging the duties of the office. This view seems to have been entertained by the court below, and is conceded by counsel on both sides of the case. It is surely correct.

The District Court found that plaintiff was, during the time the services in question were rendered, sheriff *de facto*, acting in good faith under a claim of right to the office, and is, therefore, entitled to recover the compensation provided by law for such services. Here is the decisive error of the learned judge of the District Court. The doctrines of the law applicable to officers *de facto* do not extend so far as to confer upon them all the rights and protection to which an officer *de jure* is entitled. The doctrines operate only for the protection of the public. They cannot be invoked to give him the emoluments of the office as against the officer *de jure*. Upon this very point we used the following language in *McCue v. The Circuit Court of Wapello County*, 51 Iowa, 60 (67). "It will be remembered that one exercising the power of an officer without lawful authority is regarded as an officer *de facto*, not for his own protection or advantage, but for the protection of the public and those who are doing business with him. When his right to the possession of the office is to be determined he cannot be declared an officer *de jure* on the ground that he has been an officer *de facto*." We may add that the right to the possession of an office carries with it the right to emoluments pertaining to the place. When

2. PUBLIC OFFICER: officer *de facto*: right to fees.

McCue v. The County of Wapello.

an officer seeks to recover these emoluments he must show his right to the possession of the office. The rule is based upon the ground that the officer *de jure*, who has been ousted from his place by an intruder, has a property interest in the emoluments of the office, of which he cannot be deprived by one having no title thereto. This property right demands protection, and the officer *de facto* cannot recover emoluments to which the officer *de jure* is entitled. No such right intervenes when the acts of a *de facto* officer done in the discharge of the duties of the office are considered. The rights and protection of the public and all persons transacting business with the officer demand that such right be held valid. But when the question involving the emoluments of the office are considered, the rights of the officer *de jure* forbid that the intruder be regarded as the officer.

The case of a *de facto* officer is not unlike that of one in possession of land without right or title. He may in many things lawfully act as the owner of the realty, but he must account to the person holding the title for the rents and profits. These views we think are supported by the following cases: *Glascock v. Lyons*, 20 Ired., 1; *Comstock v. Grand Rapids*, 40 Mich., 397; *Riddle v. Bedford*, 7 S. & R., 386; *People v. Dorsey*, 28 Cal., 21; *People v. Oulton*, Id., 44; *Carroll v. Siebenthaler*, 37 Cal., 193; *People v. Webber*, 86 Ill., 283; *Mayfield v. Moore*, 53 Ill., 428; *People v. Miller*, 24 Mich., 458.

V. The principle upon which our conclusion is based, viz., that an officer *de jure* is entitled to the emoluments of the office, is recognized by the statute of this State providing for contesting the election of a county officer. A special court is provided for the trial of cases growing out of such contests. It will be observed that the trial under the provision of the statute will ordinarily be had before the commencement of the term of the office in contest. But if an appeal be taken by a party in possession of the office the judgment will not be suspended unless he execute a bond obli-

McCue v. The County of Wapello.

gating himself to pay all compensations received by him after the judgment appealed from was rendered to the other party should he be successful in the appeal. If the appeal be affirmed judgment will be rendered upon the bond for damages, which will, of course, cover the compensation received by the appellant. See Code, §§ 692, 716, 717. In case of an appeal by an incumbent of an office under these provisions, it cannot be doubted that pending the appeal he is to be regarded as the officer *de facto*, and that after the appeal is affirmed the other party is to be regarded as the officer *de jure*. The statute in these provisions require the *de facto* officer to pay the compensation he receives for services rendered by him to the officer *de jure*. This is just what we hold in this case.

VI. The court below found that plaintiff held the office under a claim of right and in good faith, and that he was not a mere intruder. The good faith and claim of right of an officer *de facto* cannot affect the rights of the officer *de jure* to emoluments of the office, nor will these things deprive the incumbent of the character of an intruder. Good faith and claim of right are usually, if not always, exercised by *de facto* officers; if they be absent he is criminally liable. Code, §§ 3962-3. The officer *de facto*, when the rights of the *de jure* officer are considered, must be regarded as an intruder even though he claim the office in good faith. This conclusion is supported by the authorities just cited.

We reach the very satisfactory conclusion that plaintiff is not entitled as an officer *de facto* to recover the emoluments of the office; that Stewart, the officer *de jure*, is entitled to all of them, and that defendant is not liable in this action.

VII. The fact that plaintiff actually performed the services, and made the outlays for which he sues, seems to have had much influence in the determination of the cause by the court below. Doubtless he is entitled to recover from the officer *de jure*, Stewart, the compensation to which he is entitled by contract or by law. It will be remembered that he

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was the sheriff's deputy when the void order for the removal of that officer was made; Stewart's right to the office was not affected by that order; the appointment of plaintiff was not revoked, and it continued valid during the time he acted as sheriff. The law regards Stewart as the sheriff during all this time, and plaintiff as his deputy. Plaintiff's emoluments must be determined by the contract existing between him and Stewart, either express or implied, or by the statute regulating the compensation of deputy sheriffs, if there be any applicable to this case.

The judgment of the District Court will be reversed and the cause will be remanded for judgment in accord with this opinion.

REVERSED.

GEORGE V. HART.

1. **Judgment Sale: REDEMPTION: JUDGMENT CREDITORS.** The right of judgment creditors to redeem from an execution sale of property of their debtor becomes barred in nine months from the date of the sale, unless exercised by some creditor within that time.

Appeal from Madison District Court.

FRIDAY, OCTOBER 21.

ACTION to enforce a redemption from a sheriff's sale of real estate upon certain judgments. There was a demurrer to the petition, which was sustained. The facts will appear in the opinion. The plaintiff appeals.

McCaughan & Dabney, for appellants.

John Leonard, for appellee.

ROTHROCK, J. On September 13, 1878, two judgments

George v. Hart.

were recovered in the District Court of Madison county against one Horton. On the 13th day of December, 1879, the sheriff of said county sold certain real estate in satisfaction of said judgments.

1. JUDICIAL
sale: re-
demption:
judgment
creditors.

The sales were subject to redemption, and the defendant Hart was the purchaser. October 30, 1879, the plaintiff herein recovered judgment against said Horton. On the 30th day of April, 1880, the defendant Hart recovered a judgment against Horton, which was made a special lien upon certain other real estate, which was sold by the sheriff on the 19th of June, 1880, for the amount of the judgment excepting about five dollars. On the 13th day of December, 1880, the plaintiff herein deposited with the clerk of the court the amount claimed to be necessary to redeem from the sales to the defendant, and filed with the clerk his affidavit stating the amount still unpaid and due upon his own claim, and at the same time caused it to be entered upon the record of the sales aforesaid that he was willing to take the land at the full amount paid in redemption, and in addition thereto credit the sum of \$150 upon his own judgment. The defendant refused to accept the money deposited with the clerk in redemption.

The only question presented by these facts is, had the plaintiff the right to redeem from the sales to the defendant. It will be observed that plaintiff made the deposit, claiming the right to redeem, one year from the day of the sale.

Section 3102 of the Code provides that the defendant may redeem real property at any time within one year from the day of sale. Section 3103: "For the first six months after such sale his right to redeem is exclusive, but if no redemption is made by him, at the end of that time any creditor of the defendant, whose demand is a lien upon such real estate, may redeem the same at any time within nine months from the date of sale * * * ." It appears from these sections that if no redemption be made by any creditor within nine months such right is extinguished and no redemption can thereafter be made by any one excepting the judgment debtor.

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§ § 3104 to 3111 contain provisions for creditors redeeming from each other. Sec. 3112 is in these words: "After the expiration of nine months from the day of sale the creditors can no longer redeem from each other except as hereinafter provided; but the defendant may still redeem at any time before the end of the year as aforesaid." Counsel for appellant contends that the redemption "hereinafter provided" in § 3112 is found in § 3118, which is as follows: "The mode of making the redemption is by paying the money into the clerk's office for the use of the persons thereto entitled. The person so redeeming, if not defendant in execution, must also file his affidavit, or that of his agent or attorney, stating as nearly as practicable the amount still unpaid and due on his own claim."

It appears to us this is a provision applying to redemptions generally. It merely provides the mode or manner by which a redemption may be made at any time and by any one entitled to redeem. Sections 3113 to 3117, inclusive, point out and state the exceptions to 3112. We are clearly of the opinion that as no creditor redeemed from the sale within nine months the right to make redemption after that time was lost. Something is claimed from the fact that the defendant herein was a junior judgment creditor, as well as a purchaser. We think this cannot be held to extend the time for redemption. If no redemption by a creditor be made within nine months none can be made after that time. The ball must be set in motion, so to speak, within the time prescribed by the statute.

AFFIRMED.

Allerton v. Eldridge.

ALLERTON V. ELDRIDGE.

1. **Practice: APPEAL: FROM INTERLOCUTORY ORDER.** The statute does not give a right of appeal from an order granting a change of venue, but an appeal properly taken from an interlocutory order affecting substantial rights brings up for review all rulings theretofore made in the action and duly excepted to.
2. —: **CHANGE OF VENUE.** A change of venue may be had on the ground of the prejudice of a judge, on a proper showing, although the term of the presiding judge expires before the next ensuing term of court, which is the first term at which the case can be tried.
3. **Attachment: GROUNDS FOR: FACTS CONSIDERED.** Facts considered and held insufficient to authorize an attachment.
4. —: **RELEASE OF: BOND.** A bond given by an attachment defendant in whose custody the attached property is left, conditioned that he will return the same on demand to the sheriff, does not constitute a statutory delivery bond which will discharge the attachment.

56	709
86	89
56	709
99	157
101	62
56	709
105	733
56	709
109	47

Appeal from Jasper Circuit Court, also Polk Circuit Court.

FRIDAY, OCTOBER 21.

ACTION IN EQUITY. The plaintiff filed her petition in the Circuit Court of Jasper county, asking, among other things, for a specific attachment against certain property, and also for a general attachment. A writ was issued containing two mandates, one for a specific attachment and one for a general attachment. Afterward the defendant filed an affidavit that he was about to file a motion to dissolve the specific attachment. He also filed a motion for a change of venue to the District Court. The plaintiff objected to any change, and especially to a change to the District Court, and filed an affidavit of prejudice of the District Judge. The Circuit Court granted a change and ordered the cause to be transferred to the Circuit Court of Polk county. The plaintiff gave notice of an appeal, and filed a supersedeas bond. The proper papers were filed by the defendant in the Circuit Court of Polk county. A copy of the notice of appeal and supersedeas

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bond were filed in the same court by the plaintiff, and a motion was made by her for a postponement of all proceedings in the cause pending the appeal, which motion was overruled and the plaintiff excepted. The defendant then filed a motion to dissolve both attachments, which motion was sustained except as to a portion of the property held under the general attachment, to which ruling the plaintiff excepted. She appeals from both rulings excepted to.

Ryan Bros., for appellant.

S. S. Patterson and Nourse & Kauffman, for appellee.

ADAMS, CH. J.—I. The first question presented is as to whether the plaintiff had a right to appeal from the order granting a change of venue at the time she attempted to appeal. If she had, then her appeal, 1. PRACTICE: appeal from interlocutory order. a supersedeas bond having been filed, should have had the effect to stay proceedings, and the Circuit Court of Polk county erred in not sustaining the plaintiff's motion to postpone.

An appeal may be taken from "an order made affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken." Code, § 3164, subdivision 1. The plaintiff insists that an order granting a change of venue is of the kind above described.

But sending an action to another court to be tried does not determine the action, nor does it prevent a judgment from which an appeal may be taken. In our opinion the statute cited does not give plaintiff the right of appeal which she claims.

But the plaintiff cites to us subdivision 2 of the same section, in which it is provided that an appeal may be taken from "a final order made in a special proceeding affecting a substantial right therein." It is equally evident to our mind

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that the order granting a change of venue is not the kind described in this provision.

There are some other orders from which an appeal may be taken, but the plaintiff does not claim that the order in question is one of them, and it is sufficient for us to say that we think it is not.

It follows, then, that at the time of the action of the Circuit Court of Polk county no appeal had been taken which the court was bound to respect, and that the court did not err in overruling the plaintiff's motion to grant a postponement of proceedings pending the appeal.

Now, while it appears to us that the plaintiff had no right of appeal from the order granting the change of venue at the time she attempted to appeal therefrom, yet as a right of appeal has arisen from an order subsequently made; viz., the order dissolving the specific and general attachments, it appears to us that we may properly review any other error which the appellant claims was made in the case. Because the statute does not provide for an appeal from an order granting or refusing a change of venue, it does not follow that the action of the court in granting or refusing such change is not reviewable. The right to such review is expressly recognized in *Jones v. The C. & N. W. Ry Co.*, 36 Iowa, 68, and *Ferguson v. Davis county*, 51 Iowa, 224. An appeal after final judgment will bring up for review all the rulings in the case which have been properly excepted to. And we see no reason why an appeal properly taken before final judgment may not bring up for review all the rulings in the case theretofore made and properly excepted to. The reason for not allowing an appeal directly from each intermediate ruling not affecting a substantial right, as the admission or exclusion of evidence, etc., is that the allowance of such appeals would too greatly postpone the final disposition of the case. *Richards v. Burden*, 31 Iowa, 305. Subject to this consideration it is evidently important that all errors should be corrected as early as possible. The statute

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does not provide expressly, nor we think by implication, that these lesser intermediate rulings shall not be reviewable until after final judgment. It merely fails to provide that the party claiming to be aggrieved by the rulings shall have a right of appeal by reason of the rulings alone, and in advance of a ruling affecting a substantial right.

In our opinion, then, the case having been properly brought to us on appeal, the ruling upon the motion for a change of venue may be reviewed as well as the ruling upon the motion to discharge the attachments.

The motion for a change of venue was based upon the ground of the prejudice of the circuit judge. The motion, <sup>2. ——— :
change of
venue.</sup> it appears, was filed in vacation, and but a few days before the term of office of the presiding judge was to expire by limitation, when he was to be succeeded by another person, and no term of court was to intervene. The plaintiff insists that in such case the prejudice of the judge does not constitute a ground for a change of venue.

While it might have been certain to the judge to whom the application was made that no trial could be had, yet it was not certain that motions might not be made which he would be called to rule upon at chambers. This consideration alone, we think, was sufficient to entitle the defendant to a change of venue. It is true that a change of venue is called in the Code a change of place of trial; but we cannot think that the design was to allow a judge to whom objection is made to retain a case for the disposition of all preliminary questions before granting a change of venue, where the application had been made in the mode in which the statute requires. Indeed, where the objection is to the court, the statute expressly contemplates that a change shall be had before the issues are made up and before the case is ready for trial. It is not true then, as the plaintiff contends, that a change can be had for no purpose other than the trial.

We may say further that, if we could see no reason whatever in the nature of things for a change in this case, we

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should hesitate, in view of the imperative language of the statute, to hold that a change should not be granted where the statute providing for a change had been fully complied with.

In our opinion the motion for a change of venue was properly sustained.

II. We come now to inquire whether the motion to discharge the attachments was properly sustained.

The plaintiff's assignor, one A. M. Allerton, had entered into a contract with the defendant for an exchange of property, whereby he sold to defendant 2,100 acres of land in the counties of Jasper and Marshall, and certain farming utensils, horses and other personal property; and in consideration thereof the defendant sold and transferred to the plaintiff's assignor certain stock in the East River Gas Light Co., of Long Island City, whose par or nominal value was \$95,000, and the defendant was to pay off the floating indebtedness of the company, which was stated to be \$2,500. He also agreed to procure and deliver to the plaintiff's assignor the remaining stock of said gas company, whose par or nominal value was \$5,000, but whose actual or market value was \$2,250, which stock was to be delivered at the time the deed of the land should be delivered, which was to be done on or before December 10, 1879, or in case of failure the defendant was to pay therefor the value thereof, viz., forty-five dollars per share. The plaintiff's assignor contracted also in the same instrument to sell to the defendant certain hogs, shoats, steers, calves, cows, heifers and a Durham bull, for which the defendant was to pay him fifteen thousand dollars in money, and the title to the stock was not to vest in the defendant except as the same was paid for. After the plaintiff succeeded to all the rights of A. M. Allerton under the contract, the defendant executed to her a chattel mortgage to secure the payment of the said sum of \$15,000. She now brings this action for an accounting, averring, among other things, that the defendant falsely rep-

a. ATTACH-
ment :
grounds for:
facts con-
sidered.

Allerton v. Eldridge.

resented the floating indebtedness of the gas company to be much smaller than it is; that it is in fact \$9,000, and that the defendant refuses to pay the same and refuses to allow her to pay the same until there has been an adjudication thereon. She also avers that the defendant has not delivered to her the remaining stock of the par value of \$5,000 nor any part thereof, and that he is not able to deliver the same and does not design to do so. She also avers that he has failed to pay certain interest upon mortgages upon the property of the gas company which he agreed to pay, and which she has paid. She avers that the defendant is a non-resident of Iowa; that the indebtedness was incurred for property obtained under false pretenses, and that nothing but time is wanting to fix an absolute indebtedness. She also avers that she has reason to believe and does believe that the defendant, unless restrained by court, will dispose of said property fraudulently and for the purpose of putting the same beyond her reach. She asks judgment for the sum of \$12,500 and a special attachment against the real and personal property of the defendant received through the contract, and a general attachment against the goods and chattels of the defendant generally.

An order was granted by the judge that a writ of attachment issue as prayed, and a writ was accordingly issued and levied.

We will proceed first to inquire as to whether the plaintiff was entitled to a specific attachment.

Section 3000 of the Code provides for a specific attachment of personal property where the plaintiff has a lien upon the property, and where it satisfactorily appears from the petition, verified on oath or by affidavit, or the proofs in the cause, that the plaintiff has a just claim, and that the property has been or is about to be sold, concealed, or removed from the State, or where the plaintiff states on oath that he has reasonable cause to believe and does believe that unless prevented by the court the property will be sold, concealed or removed from the State.

This provision evidently affords no warrant for a specific attachment of real estate. Whether it affords a warrant for a specific attachment of the personal property must depend among other things upon whether the indebtedness sought to be recovered is a lien upon the property. The indebtedness sought to be recovered is no part of the \$15,000 arising under the second part of the contract, and for which a chattel mortgage was given. It consists of the \$9,000 alleged to be the floating indebtedness of the gas company and \$2,250 alleged to be due for failure to deliver the gas stock remaining to be delivered, and \$950 alleged to be due by reason of certain interest paid by plaintiff, but which should have been paid by the defendant.

As to the \$9,000, we think it is sufficient to say that it is not alleged that the plaintiff has paid it, nor is there any allegation in respect to it upon which a recovery can be based. We are of the opinion also that no recovery can be had for the \$2,250. Until the expiration of the time within which the defendant might deliver the stock no money claim arose for want of delivery. The deed of the lands was to be delivered on or before December 10, 1879, and the stock was to be delivered within one year thereafter. This action was brought November 15, 1880. The defendant had at least a year from the delivery of the deed, if the deed was not delivered later than December 10, 1879. It does not appear that a deed of all the lands has been delivered yet. The defendant had, then, until December 10, 1880, at least, in which to perform his contract. The action was brought before that time. It is not true that nothing but time was wanting to create an absolute indebtedness. Time and a failure to deliver the stock were wanting.

So far as the item of \$950 is concerned, being the alleged indebtedness for the payment of interest, there is no pretense that the plaintiff had a lien. She may have been entitled to a general attachment for this indebtedness, and that she is allowed to have, and no question is raised by either party in

Allerton v. Eldridge.

regard to this item. Having reached the conclusion that the other alleged indebtedness has no existence, it would be improper to inquire whether the plaintiff would have a lien therefor if it did exist as alleged.

But the plaintiff claims that she is entitled to a specific attachment under section 3001 of the Code. That section provides for such attachment where the petition shows a fraudulent purchase of the property, and where the action is brought to vacate the contract and have a restoration of the property.

But this action was not brought for that purpose, and the section has no applicability to the plaintiff's case.

She contends, however, that the defendant was estopped from moving to discharge the attachment, whatever grounds
4. — : there might otherwise have been for such dis-
release of :
bond. charge, because the defendant gave a delivery bond for the property and received the same into his possession. A copy of the bond and receipt is set out. The plaintiff's theory is that by the execution of the bond, signed as it was by the defendant and another person, and by the receipt of the property, the attachment was discharged, and hence there was nothing upon which the motion to discharge could operate.

Without considering whether she could be prejudiced by the sustaining of the motion if the plaintiff's theory is correct, we have to say that we do not think that the attachment was discharged by the giving of the bond and receipt. The statute, Code, section 2994, prescribes the kind of bond that shall be given in order to effect the discharge of the attachment. It must be to the effect that the defendant will perform the judgment of the court. Such bond becomes a new and substituted security for the attachment. The bond given was not such bond. It contained no obligation to perform the judgment of the court, but merely to return the property. It was such bond as the sheriff might have taken from any person to whom he had entrusted the property for safe

Pellersells v. Allen.

keeping. The property consisted of hogs, horses, corn, hay and property that needed care. The reason for giving the bond as recited therein is that the property needed care. It was competent for the sheriff to arrange with the defendant to take the property and bestow the needed care. The receipt provided that the property should be returned to the sheriff on demand for justifiable cause, of which the sheriff was to be the judge. He might then take possession. This, we think, shows very clearly that the lien of the attachment was not deemed to be discharged. The motion to discharge, then, was in order, and we think it was properly sustained so far as it was sustained.

AFFIRMED.

56	717
91	467

PELLERSELLS V. ALLEN ET AL.

1. **Judgment: SUPERSEDEAS: REPLEVIN.** Where property attached was released by a justice of the peace as exempt, on motion therefor, it was held that such decision was conclusive as to the defendants' right to the property until reversed, and that he might maintain replevin therefor if again seized by the plaintiff, although the latter had sued out a writ of error from the decision of the justice but had filed no supersedeas bond.

Appeal from Sac District Court.

FRIDAY, OCTOBER 21.

ACTION to recover specific personal property. The alleged ground of detention was that one of the defendants had levied upon and taken the property into his possession under and by virtue of an execution against the plaintiff, who claimed the property was exempt from execution. Trial by jury. Verdict and judgment for plaintiff, and defendants appeal.

Charles D. Goldsmith, for appellants.

Davis & Ellwood, for appellee.

Pellersells v. Allen.

SEEVERS, J.—I. The defendant Allen commenced an action before a justice of the peace against the plaintiff, in which

1. JUDGMENT: an attachment was sued out and the property in
supersedeas :
replevin. controversy attached, on the 19th day of November, 1880. In said action the present plaintiff filed a motion under § 3018 of the Code to discharge the property because it was exempt from execution. On the 27th day of November, 1880, the main action was tried, and also said motion heard and determined. The motion was sustained and the property discharged, but the defendant Allen recovered a judgment against the plaintiff. Said judgment was general and was not a lien on the attached property. On the 29th day of November, 1880, the defendant Allen sued out a writ of error from the Circuit Court on the ground the justice had erred in discharging the attached property, and this action was pending, as we understand, when this cause was tried. On the day last aforesaid Allen caused an execution to issue on the judgment rendered in his favor by the justice of the peace, and by virtue of such execution and a levy thereunder the defendants have possession of the property in controversy.

The defendants pleaded the matters aforesaid in abatement of this action, the argument being that the judgment on the motion was an adjudication, but that the suing out of the writ of error had the effect to transfer the proceeding to the Circuit Court, and as it has not been determined this action should be abated.

The motion to discharge the property being authorized by statute, the adjudication of the justice discharging the property was final and conclusive unless it was suspended or reversed as provided by law. The plaintiff, then, was entitled to the possession of the property in accordance with the order discharging it from attachment. The judgment in the main action did not continue the lien of the attachment. If preserved at all, or, if the sheriff was entitled to possession under the attachment, it must be the suing out of the writ of

Pellersells v. Allen.

error had such effect. The statute provides when attached property has been discharged the plaintiff, in case he desires to appeal, may so announce, and if the appeal is perfected within two days the lien is preserved. Code, § 3019. But in order to have this effect a supersedeas bond must be given. Code, § 3186. If it be conceded a writ of error should have the same effect as an appeal, a bond is required if a stay of proceedings is desired. Code, § 3601. In the present case no such bond was given and the lien of the attachment ceased. The levy under the general execution amounted to a new seizure and the plaintiff was without remedy unless he can maintain this proceeding. We think he can do so, and the court did not err in overruling the plea in abatement.

II. The plaintiff in substance testified he had lived in Wisconsin but had left there intending to go to Sac City, Iowa, and that such place was his residence. On cross-examination he was asked "Did you tell any one you were going to any other place than Sac City, Iowa?" An objection to this question was sustained. It is not claimed the question was asked for the purpose of impeachment. If the plaintiff had made such statement it was competent to so prove by any person to whom it was made. No such attempt was made. The evidence sought to be elicited would only have a remote bearing on the issue, and if answered in the affirmative could not have changed the result. Therefore the error, if it is such, cannot be regarded as prejudicial.

III. The sheriff was on the stand as a witness for plaintiff and produced, and the same was offered in evidence, the execution and return thereof. The defendant objected on the ground of incompetency. The objection was overruled. It is now said the ruling was erroneous because the execution and return is a part of a judicial record and should have been on file in the justice's office, and the latter alone could certify to its genuineness. In this view we do not concur. It was not objected below the execution was not genuine, or did not come from the proper repository, and such objection cannot

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be made for the first time here. Besides this the execution introduced in evidence was identified by the sheriff as the one under which he acted, therefore it makes no difference where it came from or whether it had ever been returned to the justice.

IV. One Hunefelt was introduced as a witness by the plaintiff and testified to the value of the horses, whereupon the defendants sought to prove on cross-examination the plaintiff never claimed the horses were exempt, but had waived the provisions of the law in this respect. The court refused to permit this to be done, and the ruling was right, because it was not proper cross-examination, and besides this the witness did afterward testify fully as to the matters aforesaid.

In view of what has been said it is not deemed necessary to notice the other errors assigned and argued except to say the instructions are correct and the verdict is in accord therewith.

AFFIRMED.

SMITH & BAYLIES V. THE C., R. I. & P. R. Co.

- | | |
|-----|-----|
| 56 | 720 |
| 138 | 689 |
| 138 | 690 |
| 138 | 691 |
1. **Attorney's Lien : NOTICE OF: SUFFICIENCY.** A notice of a claim for an attorney's lien, inserted by the plaintiff's attorneys in the original notice served upon the defendant in an action, is sufficient if properly signed.
 2. —: —: **SERVICE ON CORPORATION.** The service of notice of a claim for an attorney's lien upon the agent of a corporation upon whom the original notice in the same action is served, and at the same time, is a sufficient service to bind the corporation.
 3. —: **WHEN GIVEN: ACTIONS OF TORT.** The right to a lien on money due his client in the hands of the adverse party, given an attorney by subdivision 3 of section 215 of the Code, is not confined to actions on contract, but exists in all actions where there is a money liability from the adverse party to his client.
 4. —: **NOTICE.** A single notice that a lien is claimed is sufficient to cover all services rendered in the action by the claimant, whether before or after the service of the notice.

 Smith & Baylies v. The C., R. I. & P. R. Co.

Appeal from Polk Circuit Court.

FRIDAY, OCTOBER 21,

THE plaintiffs were employed by one Johnson to commence and prosecute an action against the defendant for a personal injury. They allege that at the time of the commencement of the action they gave notice to the defendant that they claimed an attorney's lien upon money in defendant's possession due Johnson, for general balance of compensation due them for services as attorneys for Johnson. They allege that after the service of such notice the defendant settled with, and paid, Johnson in full in disregard of their attorney's lien; that judgment has been obtained against Johnson for \$100 for such services; that execution has been issued and returned unsatisfied, and that the judgment is wholly unsatisfied. They therefore ask judgment against the defendant for \$100 and interest and costs. The several matters of defense will be set out in the opinion. There was a trial without a jury and judgment for the plaintiffs for the amount claimed. The defendant appeals.

Wright & Wright, for appellant.

Smith & Baylies, for themselves.

ADAMS, CH. J.—I. The defendant claims that the notice of the lien upon which plaintiffs rely is insufficient. The notice was inserted in the original notice, and the service of it was made in connection with the service of the original notice.

1. ATTORNEY'S
lien: notice
of: suffi-
ciency.

The objection is based upon the ground that the original notice can have but one office, and that is to bring the defendant into court; and that anything inserted in the notice not pertinent to this purpose is foreign and extraneous and ought not to be treated as having any force.

The statute simply requires the notice to be in writing.

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In this respect the notice given conformed to the statute. It was not a part of the original notice, but was written in a blank space between the parts of the original notice. If it had been written upon the margin, below the original notice, and properly signed, we think no question could be properly raised as to its sufficiency. The case, in our opinion, is not essentially different. To hold that it is would be giving more force to a mere matter of form than we feel justified in doing.

It has occurred to us that possibly a question might have been raised in regard to the sufficiency of the signing. How the notice was in fact signed does not distinctly appear. A copy is set out, but the signature is omitted. We infer, however, that it was not signed by Johnson alone, the plaintiff in that case, but by his attorneys, the present plaintiffs, who claim the lien. It would seem clear that Johnson could not give the requisite notice of the claim of a lien. The doubt we have is as to whether his attorneys could do so if they signed the paper merely in a representative capacity. So far, however, as the abstract shows, it might have been signed by the plaintiffs both in their representative and individual capacity. Besides, no question upon this point has been raised by the defendant, and we refer to it merely because we do not wish to be understood as having passed upon it.

II. It is further objected that the notice, so far as it was a notice of a claim of a lien, was not served upon the right ^{2. — : — : person.} ^{service on} ^{corporation.} It seems to be conceded that the agent upon whom the notice was served was such agent that the service was sufficient to bind the company so far as the original notice was concerned, but it is insisted that it does not follow that he was such agent that the company was bound so far as the notice of the claim of a lien was concerned.

The notice of the claim of a lien may be served upon the adverse party or the attorney of such party. In this case the adverse party is a corporation. Notice to it can be served

only by service upon some officer or agent. Upon what officer or agent notice of a claim of a lien can be served the statute does not provide. The general rule is that notice to a corporation should be served upon some officer or agent who is charged with some duty respecting the matter to which the notice pertains. Notice to a principal, generally, if served upon an agent, should be served upon such agent. The very provision of the statute allowing service of a notice of a claim of a lien to be made upon the attorney of the adverse party must be based upon the principle that the attorney is charged with a duty in respect to the claim from the proceeds of which the lien is to be satisfied. The statute provides upon what persons an original notice may be served. Whether the notice of the claim of a lien may be served upon any one of that class we do not determine. Perhaps such service could not be held to be good. A person by merely belonging to such class could not be held to be charged with any duty in respect to the claim upon the proceeds of which a lien is claimed. But the moment the original notice is served upon some individual agent of that class the agent so served becomes charged with a duty respecting the matter to which that notice pertains, viz., the claim in suit. It is his duty, at least, to deliver the papers served upon him to the proper person. Now, during the time he is charged with such duty we think that notice of a claim of a lien upon the proceeds of the claim in suit may be served upon him.

III. The point upon which the defendant seems to rely with most confidence is that, where there is nothing due
s. — : when
given: actions
of tort. from the adverse party except by way of damages for a tort, there is nothing, prior to judgment, upon which a lien can attach. The statute gives an attorney a lien upon "money due his client in the hands of an adverse party." Code, § 215. Where money is due the attorney's client only by way of damages for a tort, it is said that it cannot be deemed to be money due his client in

Smith & Baylies v. The C., R. I. & P. R. Co.

the hands of the adverse party. The defendant relies upon a bankrupt case. *In re Scroggin*, 8 Bankrupt Rep., 330. Deady, J., in construing a statute giving an attorney's lien upon "money in the hands of the adverse party," said: "Something more is meant than a mere debt from such party to the client of the attorney who claims the lien. On the contrary, money in his hands means some specific funds which have actually come into his possession as custodian or trustee, and to obtain which action is brought."

This view would deprive an attorney of a lien, not only in all actions of tort, but in all actions brought upon contract, except where brought against a custodian or trustee for specific funds held in custody or trust. We think that neither the profession nor courts of this State have placed so narrow a construction upon our statute. Indeed, it seems to have been assumed that an attorney's lien may properly be claimed in all actions upon contract (*Myers v. McHugh*, 16 Iowa, 335), and we have no doubt that this assumption is well founded.

We come next to inquire whether the actions in which an attorney's lien can properly be claimed are limited to actions on contract. The statute provides that an attorney may have a lien upon money due his client in the hands of the adverse party in "an action," etc. If by "an action" is meant simply an action upon contract, the legislative intent was certainly very inexplicitly and very strangely expressed. We can see no reason for leaving the words, *upon contract*, to be interpolated by judicial construction. But it is said that the necessity for such interpolation appears from the very nature of the case. It is said that there cannot be money due the claimant in the hands of the adverse party in an action where there is simply a liability for a tort.

In a certain sense this is true; but it is not more true than that there cannot be money due the claimant, in the hands of the adverse party, in an action where there is simply a liability upon contract. In neither case is there any specific money

upon which the attorney has a lien in the sense in which an innkeeper has a lien upon the trunk of his guest, or the landlord upon the personal property of his tenant, used upon the premises during the tenancy. An attorney's lien is a mere right to demand that when the payment of the money due the attorney's client comes to be made, whether voluntarily or involuntarily, the attorney's claim shall be respected. Viewing the lien in this light, it will be seen at once that there is no more difficulty in allowing it in an action brought for a tort than in an action brought upon a contract. But notwithstanding the general language of the statute allowing a lien "in an action", etc., without any express limitation to an action upon contract, and notwithstanding there may not be, in the nature of things, any more difficulty in allowing it in one case than in the other, yet it is said that it ought not to be allowed except in actions upon contract, and that this consideration alone would justify the court in construing the words "an action", as used in the statute as meaning *an action upon a contract*.

To this we have to say that if we deemed the consideration far more weighty than we do, we should hesitate about taking the liberty with the statute which we are asked to take. But we do not deem it of very great weight. The consideration urged is this: Litigants should be allowed to settle all claims for tort by compromise. Now it is said that an attorney's lien would embarrass such settlements, and therefore the lien should be allowed only in actions upon contract. But the argument, if sound, should be carried considerably farther. The lien should be confined not simply to actions upon contract, but to actions upon contract in which the defendant does not claim to have a defense. No good reason can be assigned why the desirableness of allowing a settlement by compromise should exclude an attorney's lien in an action for tort, brought, for instance, for destroying certain personal property, and allow an attorney's lien in an action brought to recover the reasonable value of certain work

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and labor where there was nothing in dispute except the value of the work and labor. Besides, it appears to us that the embarrassment, which the defendant's counsel so greatly deprecate, is an embarrassment in paying, and not in agreeing by compromise upon the amount due. The lien given is not upon the claim. If it were perhaps the attorneys would have a right to control the claim if they saw fit, so far as to prevent any settlement that should not yield their client enough to pay them. But the statute gives a lien merely upon the money due. This does not prevent the parties from agreeing as to the amount due if they act in good faith, and if they do thus agree the amount agreed upon becomes the amount due, and that is all that the attorneys have a lien upon.

In the case at bar the parties agreed upon two hundred dollars as the amount due. So far the lien caused no embarrassment. It should have caused no embarrassment in the payment. The company should have paid the claimant's attorneys, the present plaintiffs, and allowed them to settle with their client for what their services were worth. But the defendant claims that it was its right to pay the claimant directly, in the absence of the attorneys, and without their knowledge.

The right to make such payment would doubtless be valuable in many cases. It is well known that irresponsible and unscrupulous claimants can be settled with upon more favorable terms after expensive litigation, if they can be allowed to receive the whole payment and cheat their attorneys. But however valuable the right may be, this consideration has no weight when addressed to a court.

Nor, do we think that there is anything which we can notice in the objection that if a lien is allowed attorneys will advise against proper settlements by compromise. The lien is valuable, mainly, where the claimant is irresponsible. Where such is the case and the claim is a doubtful one, the

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attorneys are as much interested in settling by compromise as the claimant.

Having considered how the question stands upon principle, we have to inquire how it stands upon authority. The defendant relies upon *Wood v. Andres*, 5 Bush (Ky.), 681; *Henchy v. The City of Chicago*, 41 Ill., 136; *Coughlin v. N. Y., C. & H. R. Co.*, 71 N. Y., 443; *Hobson v. Watson*, 34 Me., 20; *Hutchinson v. Howard*, 15 Vt., 24; *Foot v. Tewksbury*, 2 Vt., 97; *Hutchinson v. Pettes*, 18 Vt., 614; *Chapman v. Hood*, 1 Taunton, 341.

All these cases except the first are cited in support of the proposition that there cannot be an attorney's lien before judgment. But under our statute it is evident that there can be. The provision under consideration is found in subdivision 3, of section 215 of the Code. Subdivision 4 of the same section provides for obtaining a lien after judgment. If no lien could be had except after judgment, no force could be given to subdivision 3. Besides, in *Myers v. McHugh*, above cited, the existence of an attorney's lien before judgment was expressly recognized.

The case of *Wood v. Andres*, cited by defendant, was decided under a statute which is in these words: "Attorneys-at-law shall have a lien upon any chose in action, account, or other claim or demand, put into his hands for suit or collection." It was held that the claim or demand, contemplated by the statute, was a claim or demand arising only by contract. We cannot say, taking the whole provision together, that the construction placed upon the language used is not correct.

But our statute is different. It gives a lien upon "money due." It gives a lien, we think, wherever there is a liability to be discharged in money, and action is brought for its recovery. Damages for a tort are to be paid in money. It may be that the lien in such case, or in any case, is not enforceable until the amount has been determined by judgment

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or agreement. But whenever enforceable the lien dates from the service of the notice. Code, § 215.

The only decision to which our attention has been called, made by an appellate court upon a statute similar to ours, is in *K. P. R. Co. v. Thatcher & Stephens*, 17 Kansas, 92. That action, like the present, was brought to recover for personal injury. Notice of a claim of an attorney's lien was given. Afterward the company settled with and paid off the claimant, and no judgment was rendered. The court held that the lien attached, and that the attorneys were entitled to recover of the company. The court said: "This (statute) gives a lien, not simply upon a judgment, but upon 'money due.' It does not specify for what the money must be due, nor limit the lien to any particular class of liability or form of action. Wherever an action is pending in which money is due the attorney may establish his lien. And in an action the verdict and judgment do not create the liability, do not make the money due. They are simply the conclusive evidence of the amount due from the commencement of the action."

In our opinion, then, the fact that the action in which the plaintiff's lien was sought was for a tort, and no judgment was rendered, is not sufficient to defeat their lien.

IV. It is said by the defendant, however, that the plaintiffs had a contract with their client, Johnson, for a contingent fee, to-wit: one-half of the amount recovered, and that the notice of a claim of a lien as given, which was a claim of a lien for general balance of compensation, was not sufficient to give notice of the plaintiff's contract.

We do not feel required to determine this question. We have examined the evidence, and fail to find the contract alleged. The evidence tends to show that at the time the services were rendered such contract did not exist, but that the plaintiffs were entitled to charge their client what their services were reasonably worth and no more. Afterward, however, Johnson claimed that the plaintiffs were to have one-

Stroup v. Haycock.

half and only half. So they settled with him, so far as the amount was concerned, upon that basis, and took a judgment for that amount. In proving their claim against the defendant they proved what their services were reasonably worth, and their recovery was based upon such proof.

V. One question remains to be considered. At the time the notice was served only a small fraction of the plaintiffs' services had been rendered. It is claimed that no
 4. ——— :
 notices. lien could attach by reason of the service of such notice except for services then rendered.

If this construction of the statute is correct, attorneys, in order to protect themselves fully, would need to serve notices continually while their services were being rendered. We think that one notice was sufficient to cover all the services then rendered, or thereafter rendered, in the action. In our opinion the judgment must be

AFFIRMED.

STROUP V. HAYCOCK ET AL.

1. **Contract:** FOR SALE OF REAL ESTATE: CONSTRUCTION OF. A written contract construed and held to constitute a sale of real estate subject to forfeiture, and not a mortgage, the relation of debtor and creditor not being created thereby between the parties.

Appeal from Keokuk Circuit Court.

THURSDAY, OCTOBER 21.

ACTION AT LAW to recover the possession of certain real estate. The plaintiff claimed title under a foreclosure of a mortgage executed by the defendants, a sale of the premises and conveyance by the sheriff.

The defendants pleaded the following equitable defense:

"That plaintiff obtained a judgment in the District Court of said Keokuk county, December 3, 1878, for \$774.93 debt,

Stroup v. Haycock.

and \$67.90 costs, against B. A. Haycock, and a decree foreclosing a mortgage on the property described in petition, against both defendants. January 20, 1879, said property was sold on special execution issued on said judgment and decree to plaintiff for the sum of \$872.06. January 9, 1880, it was agreed between plaintiff and defendant B. A. Haycock, by parol, that said Haycock should pay the sum of two hundred dollars of said indebtedness then, and plaintiff should extend the time for the payment of the balance of said debt—to-wit, \$759.26—for twelve months from the 20th day of January, 1880, and that in order to secure the payment of the balance of said last mentioned sum the defendants should not exercise their right of redemption of said property, which lien had then eleven days to run, but permit the sheriff to execute a deed for said property direct to plaintiff, and plaintiff should execute to defendant B. A. Haycock a bond for a deed for said property on the payment of said amount; and in pursuance of said agreement said Haycock paid the said sum of two hundred dollars down, and agreed to pay the \$759.26, with ten per cent interest, on the 20th day of January, 1881, and plaintiff executed and delivered to him a bond for a deed for said property, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof, and the sheriff did, on the 21st day of January, 1881, execute a deed to plaintiff for said property, in pursuance of said agreement, and this is the deed referred to in plaintiff's petition, and the one under which he claims title. Defendants have been the owners of said property, and in possession thereof, since a time prior to the execution of the mortgage to plaintiff, foreclosed December 3, 1878, and are still in possession of the same."

To such defense there was a demurrer, which was sustained, and the defendants appeal.

Sampson & Brown, for appellants.

Mackey & Mackey, for appellee.

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SEEVERS, J. Exhibit "A", referred to in and made a part of the answer, is as follows:

"Know all men by these presents, that I, John Stroup, of Keokuk county, Iowa, am held and bound to B. A. Haycock, of the same place, in the penal sum of one thousand dollars, on the following conditions:

"Whereas, the said John Stroup has this day sold to the said B. A. Haycock the following described real estate in the

1. CONTRACT: county of Keokuk and State of Iowa, viz.: Com-
 for sale of
 real estate: mencing four rods west of the northwest corner
 construction
 of. of block No. four in the town of Richland, thence
 to run west twenty-one and one-fourth rods, thence south
 seventeen rods, thence east twenty-one and one-fourth rods,
 thence north to the place of beginning, for the sum of
 seven hundred and fifty-nine and 26-100 dollars, with ten per
 cent interest until paid. Now if the said B. A. Haycock, his
 heirs or assigns, shall pay to the said John Stroup the sum
 of seven hundred and fifty-nine and 26-100 dollars, with ten
 per cent interest from the 20th day of January, 1880, and
 relinquish his right of redemption of sale on execution of the
 aforesaid described premises at any time within twelve
 months from the date above, then and in that case, I, the
 said John Stroup, agree to make to the said B. A. Haycock a
 deed in fee simple to the above described premises, or forfeit
 the above sum. And it is further provided in this bond that
 time is the essence of contract, and in case the said Haycock
 fails to pay said amount he agrees to surrender me full pos-
 session of the premises, or pay all reasonable expenses in ob-
 taining possession."

The question presented by the demurrer and argued by counsel is whether the transaction between the parties was a conditional sale or should be construed to be a mortgage. The Circuit Court held it was a sale; if it is such the demurrer was correctly sustained. *Hughes v. Sheaff*, 19 Iowa, 335. This, we understand, is practically conceded by counsel for the appellants, but they strenuously insist the court

Stroup v. Haycock.

erred in holding the transaction amounted to a conditional sale; the argument being that the answer states the said Haycock "agreed to pay the \$759.26 with ten per cent interest on the 20th day of January, 1881," and this allegation it is insisted was admitted by the demurrer, and therefore the relation of debtor and creditor existed between the parties, and as the conveyance was made as security for the payment of an indebtedness or performance of a contract it should be construed to be a mortgage. In support of this proposition *Green v. Turner*, 38 Iowa, 112; *Clinton National Bank v. Manwarring*, 39 Id., 281, and *White v. Lucas*, 46 Id., 319, are cited.

The well established rule is that a demurrer only admits that which is well pleaded. The contract was reduced to writing and is contained in the bond for a deed. Turning to it we fail to find any agreement on the part of the defendants or either of them to pay any sum whatever. The most that can be said is that Haycock had the option to pay if he saw proper. He assumed no obligation to do so. The time within which the option was to be exercised was made material, and if a failure in this respect occurred Haycock agreed to surrender possession of the premises. The plaintiff could not have obtained a personal judgment against Haycock. As there was no such contract as that stated in the answer shown by the bond, the demurrer did not admit that which never existed. By the sale under execution the original debt was extinguished, and as no new obligation to pay was assumed the transaction must be regarded as a sale. *Alston v. Wilson et al.*, 44 Iowa, 130; *Iowa Railroad Land Co. v. Mickel*, 41 Iowa, 402; *Mickelwait v. Leland*, 54 Id., 662.

AFFIRMED.

HOGDON V. GREEN.

56	733
122	165

1. **Tax deed: PRESUMPTION OF REGULARITY.** Evidence held sufficient to overcome the presumption in favor of the recitals in a tax deed.
2. **Deed: AS EVIDENCE: RECITAL OF CONSIDERATION.** The recital in a warranty deed of the consideration therefor is not evidence to show that the grantee is a purchaser for value, as against one claiming adversely to his title.

Appeal from Cerro Gordo Circuit Court.

FRIDAY, OCTOBER 21.

ACTION in equity to determine the title to real estate. The plaintiff claims under the patent, and defendant under a tax title. Judgment for the former, and the latter appeals.

Ainsworth & Hobson, for appellant.

Richard Webber, for appellee.

SEEVERS, J.—I. The defendant claims in 1870 there was voted by the electors of the township in which the land in controversy is situate a tax in aid of the Central Railroad of Iowa, and that proper proceedings were had to make the same a valid charge thereon. It is further claimed that, said taxes remaining unpaid, the real estate was sold at a tax sale in 1870. This is denied by the plaintiff, and he has affirmatively shown by evidence quite satisfactory in character and extent these lands were not even offered for sale.

All other taxes were paid before the alleged sale, and some time before the day appointed therefor. One Thompson, who was acting for the railroad company, made an arrangement with the treasurer whereby the latter agreed to issue certificates to Thompson as though there had been a sale upon being paid forty cents apiece therefor, and furnished with proper receipts from the said company for the tax. This ar-

Hogdon v. Green.

rangement was carried out, and some time after the regular tax sale certificates of purchase were issued to Thompson. The lands were not offered for sale or sold. Thompson was not present when the certificates were made out. No evidence was introduced tending to show that either the auditor or treasurer made any record of the alleged sale as required by law. Rev., § 772.

Thompson assigned the certificate to one Hobson and it recites there was a sale, but it is only *prima facie* evidence thereof. Rev., § 784.

No objection was made in the court below to the competency of the evidence tending to show there was no sale. Nor is any such objection made here, but it is insisted it is insufficient to overcome the presumption which exists by reason of the execution of the certificate and deed. As to this we have no doubt, and under the evidence we find the land was not even offered for sale, much less sold.

As there has been no sale, the point made that the plaintiff is estopped from questioning the validity of the tax is immaterial.

II. Thompson well knew there had been no sale of the premises, and therefore the certificates in his hands were invalid, and such would have been the case if a deed had been made to him. This is true as to his assignee, Hobson; besides this, it is not shown the latter paid anything for the certificates, and therefore he is not a purchaser for value.

Hobson conveyed by warranty deed to the defendant. It is recited therein the consideration was one thousand dollars, which was paid. Other than this there is no evidence tending to show the defendant paid anything for such conveyance. His counsel, however, claim he is an innocent purchaser for value and therefore is entitled to be protected.

In *Sillyman v. King*, 36 Iowa, 207, it was held, "upon principle and authority that this recital in the deed, of the payment of the purchase-money, is not evidence thereof against the

2. DEED: as evidence: recital of consideration.

O'Connor v. St. L., K. C. & N. R. Co.

plaintiff (in that case) or any stranger to the deed, who is claiming adversely thereto. Such recital is evidence only as between the parties to the deed and persons claiming under or through them," and that "to entitle a subsequent purchaser without notice to protection against a prior title or equity he must have actually paid the consideration before notice."

The plaintiff is a stranger to the conveyance from Hobson to the defendant and is the owner of the prior title, and therefore the latter is not an innocent purchaser for value and cannot invoke such subsequent conveyance to defeat the prior title.

AFFIRMED.

O'CONNOR v. ST. L., K. C. & N. R. CO.

56	736
119	482

1. **Railroads: CONSTRUCTION OF ON STREETS: INSTRUCTIONS.** Instructions, in an action to recover damages for injuries to property by reason of the construction of a railroad on the street adjacent, considered and held erroneous as inapplicable to the issues made by the pleadings.
2. —: —: **DAMAGES TO ABUTTING PROPERTY.** In such actions the measure of damages is the difference between the rental value of the property with the road as constructed and its rental value if the road had been properly constructed.

Appeal from Van Buren Circuit Court.

FRIDAY, OCTOBER 21.

THE plaintiff is the owner of a lot in the city of Ottumwa, and in his petition, which consists of three counts, states in the first that the track of defendants' road is constructed in said city along and across Mill street, and where it crosses said street there is an embankment twelve feet higher than the grade of the street over which said road is operated, and that said embankment "is impassable for ordinary vehicles" so that the said lot "is not accessible from and over said Mill street * * * ; that the defendant permits the said em-

O'Connor v. St. L., K. C. & N. R. Co.

bankment to remain so constructed in and across said Mill street and continues to obstruct plaintiff's ingress and egress to and from said lot, to his great damage."

In the second count it is stated that said lot extends back to an alley and defendant "has caused a track of its said road to be laid down and over and across said alley * * * so close to the line of said lot that in using said track last named the defendant uses and occupies of said lot at least seven feet," and in running cars over said track, "run over and upon the fence of petitioner" and broke and destroyed the same, to his great damage. It was stated in both of said counts the road was run and operated without right or authority.

The third count need not be set out. There was a denial of the allegations of the petition and trial by jury. Verdict and judgment for the plaintiff, and defendant appeals.

Trimble, Carruthers & Trimble, for appellant.

H. B. Hendershott, for appellee.

SEEVERS, J.—In 1866, the city of Ottumwa passed an ordinance granting the right of way over and upon the street and alley aforesaid to the St. Louis & Cedar Rapids Railway Company. The conditions upon which said right was granted were that the company should make all necessary culverts or openings for good drainage and keep up good crossings of the track when necessary."

1. RAILROADS:
construction
of on streets:
instructions.

To the rights of said company the defendant has succeeded.

The jury were instructed as follows: The plaintiff concedes in this case "that the fee of the streets and alleys of the city of Ottumwa is in the public, and hence under the ordinance in evidence * * * the defendant would have the right to construct its road over and across Mill street in said city, and would not be liable for so doing to the plaintiff * * * unless * * * such right was used in an improper or negligent manner."

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"The ordinance does not fix any grade or elevation which the defendant shall not exceed in crossing said street, and hence there is no particular elevation at which the defendant would be required to cross the street, nevertheless the defendant would not have the right to construct the road at any grade it might choose * * * but it would be its duty to construct the same at no greater elevation than was reasonably necessary and proper for the construction of its road on and over said street, but when constructed, at such elevation as was reasonably necessary and proper, the defendant would not be liable for and on account of the elevation of the embankments on and over said street." No complaint is made of these instructions; they therefore constitute the law of the case, and they are in accord with *Slatten v. D. V. R. Co.*, 29 Iowa, 148, and *Cadle v. Muscatine Western R. Co.*, 44 Id., 11, the rule being, briefly stated, that the defendant is only liable for the negligent or improper construction of its road.

The court also instructed the jury that, while the foregoing is the rule, still it was the defendant's duty to construct good, safe and sufficient crossings over its railway, and, "in constructing such crossings * * * it would be the defendant's duty to do so with due regard to the convenience of the public travel thereon as well as to the plaintiff's right of ingress and egress to his lot." By this instruction, as we understand, the court meant the failure to put in crossings might amount to negligence or improper construction.

In so instructing the jury we think the court erred, because there is no allegation in the petition the crossings were defective, or there were none constructed, or that the road was constructed in an improper manner because there were no crossings, or that the same were necessary. The instructions are erroneous because inapplicable to the issue. The only ground upon which damages are asked in the petition is that the embankment is twelve feet higher than the grade of the

O'Connor v. St. L., K. C. & N. R. Co.

street, and because of this fact access to the lot is cut off or rendered difficult.

II. As to the alley, damages are sought to be recovered on two grounds only; first, because the track occupies a portion of the plaintiff's lot, and second, of the breaking down of the fences. Such being the issue, the court instructed the jury that, "the defendant had the right to construct its roadway along the alley in the rear of plaintiff's lot, unless in so doing the plaintiff would be deprived entirely of the use thereof, and his approach to his lot was entirely obstructed thereby, and except as aforesaid the defendant would not be liable for so doing unless it constructed or located the same in a careless or negligent manner." This instruction is erroneous because inapplicable to the issue. It not being alleged the road had been improperly constructed along, over or across the alley, nor is any complaint made because the whole alley is occupied and the plaintiff excluded therefrom and from his lot.

III. Evidence was introduced against the defendant's objection tending to show the rental value of the property before the road was constructed and afterward.

2. — : damages to abutting property. It should have been excluded because no distinction was made between a proper and improper construction of the road.

The true measure of damages in such cases has been held to be the difference between the rental value of the lot with the road as constructed, and the rental value if it had been properly constructed. *Cadle v. R. R. Co.*, before cited.

It is deemed unnecessary to notice the other errors assigned.

REVERSED.

Jones v. Marshall.

JONES V. MARSHALL.

1. **DAMAGES: WHEN EXEMPLARY ARE RECOVERABLE: PLEADING.** In an action to recover for the wrongful dispossession of the plaintiff of a dwelling house exemplary damages can only be recovered where malice is alleged and proved; such allegation must be made in the petition, and is insufficient in a reply.

56	739
91	586
56	739
105	820
56	739
109	509
56	739
110	387
56	739
131	531

Appeal from Clayton District Court.

FRIDAY, OCTOBER 21.

ACTION to recover damages for forcibly dispossessing plaintiff of her dwelling house and removing her household goods therefrom. Issue having been taken upon the allegations of the petition there was a trial by jury, which resulted in a verdict and judgment for the plaintiff for \$250. Defendant appeals.

L. O. Hatch, for appellant.

James O. Crosby, for appellee.

ROTHROCK, J.—It appears from the evidence that the defendant as agent of the owner of a dwelling house leased the same to the plaintiff, at a rental of \$2.50 per month. The defendant claimed that the plaintiff was by the terms of the contract bound to pay the rent monthly in advance, and that she failed to make such payments, and that the tenancy expired. The defendant gave the plaintiff three days notice to quit, and sometime thereafter he procured from a justice of the peace a writ of possession or order of removal to be issued to a constable, who unlocked the house in the absence of plaintiff and removed her goods. The plaintiff returned and went into the house, and said that if she went out she would have to be carried. Thereupon the constable with some assistance re-

1. **DAMAGES:**
when exem-
plary are re-
coverable:
pleading.

Jones v. Marshall.

moved her from the house by gently carrying her in the chair in which she was sitting, without touching her person.

The court instructed the jury that if they found for the plaintiff and that the defendant acted oppressively or maliciously they should give the plaintiff exemplary damages. It is provided in Sec. 2727 of the Code that, "when the party intends to prove malice to affect damages he must aver the same." There is no allegation in the petition to the effect that the acts of the defendant were done in malice, and we think no exemplary damages were proper without such allegation. If the defendant in good faith believed he had the right to take possession of the house by the means he employed for that purpose, he cannot be held liable for exemplary damages. It was, therefore, necessary to aver and prove to the satisfaction of the jury that his acts were maliciously done, in order to charge him in any amount exceeding actual damages. *Johnson v. C., R. I. & P. R. Co.*, 51 Iowa, 25.

It is averred in a reply to the answer that the acts of the defendant were done in "wanton violation of the law." If it should be held that this was a sufficient allegation that the defendants' acts were malicious, it should have been set up in the petition. Claims for damages should be made in the petition or some amendment thereto, and not in the reply.

Objections are made to other instructions given by the court to the jury, and to the refusal to give an instruction asked by the defendant.

Without going into an examination of the instructions at length, we may say that as we read the evidence as to what transpired between the parties when the contract of lease was made, and the negotiations afterward as to the necessity for payment of the rent in advance, we are of the opinion that the court laid too much stress upon what is designated in the instructions as the "original contract." There were other facts which afterward transpired as to the necessity and obligation to pay the rent monthly in advance, which it appears to us should have been considered by the jury in determin-

Gates v. Ballou.

ing the rights of the parties. We are not prepared to say, however, that these instructions were so prejudicial as to require a reversal of the case. For the error in the instruction as to exemplary damages, the judgment of the District Court will be

REVERSED.

GATES V. BALLOU ET AL.

1. Statute of Limitations: WHO MAY PLEAD: MECHANIC'S LIEN.

One having an interest in real estate, who is not made a party to an action to foreclose a mechanic's lien thereon, may resist the enforcement of the decree by injunction on the ground that the action was barred by the statute of limitations.

Appeal from Clarke District Court.

SATURDAY, OCTOBER 21.

ACTION in equity to restrain a sheriff's sale of real estate upon a decree establishing a mechanic's lien. Upon a trial the preliminary injunction which had been granted was dissolved, but the judgment on the mechanic's lien was modified by ordering a credit thereon of ninety dollars, alleged to have been paid before the judgment was rendered. The plaintiff appeals from the decree dissolving the injunction, and the defendants appeal from the order directing the credit to be made upon the judgment.

John Chaney, for plaintiff.

W. M. Wilson and McIntire Bros., for defendant.

ROTHROCK, J. This cause has once been before this court on an appeal from an order dissolving the injunction, upon answer, affidavits and motion. See 54 Iowa, 485. The order was reversed and the cause remanded and a trial was had upon the merits. It appears from the pleadings and evidence that

1. STATUTE of
limitations:
who may
plead: me-
chanic's lien.

Gates v. Ballou.

one Gardner was the owner of eighty acres of land, and that on the 2nd day of October, 1874, he executed a mortgage thereon to plaintiff to secure the payment of \$900 and interest. October 31, 1876, Gardner purchased lumber and material of one Jenson, which was used in the erection of a building on said land. At the same time he entered into a contract with Jenson by which the claim for lumber and materials was made a mechanic's lien upon the premises. This claim for a lien was filed in the office of the clerk of the District Court, on the 6th day of December, 1876. On the 28th day of August, 1878, Gardner conveyed the land to the plaintiff, in payment of the mortgage, the whole amount secured thereby being then unpaid.

Jenson assigned the mechanic's lien to one Barnard, and he assigned the same to the defendant Wilson, and on May 8th, 1879, Wilson commenced an action to foreclose the mechanic's lien, in which Gardner alone was made party defendant. At the next term of court judgment was rendered against Gardner for the full amount of the claim, and a decree was entered, establishing the lien as against the building and land. Special execution was issued upon the judgment and decree, and the land was levied upon and the sheriff was proceeding to sell the same, when this action was commenced. The plaintiff claims that Gardner had paid \$90 of the indebtedness before it was assigned to Wilson, and also that the claim should not be enforced against either the building or land, as against the plaintiff, because the same is barred by the statute of limitations. The evidence as to the payment of the sum of \$90 is in conflict. The District Court found that the payment was actually made, and we incline to think the finding was correct. But in the view we take of the case a determination of this question is unnecessary. We think the whole controversy must be disposed of upon the question as to the statute of limitations. The mechanic's lien was filed, as has been seen, on the 6th day of December, 1876. No action was commenced to foreclose the same until May 8th,

Gates v. Ballou.

1879, a period of more than two years. The action to foreclose the lien could not have been maintained if Gardner had resisted it. Code, § 2529. The plaintiff herein was not made a party to that action, although she was then invested with the title to the land by Gardner's conveyance to her. It cannot be doubted that while she could have made no effectual resistance to a judgment against Gardner, if she had been made a party, yet she could have interposed the statute of limitations as an effectual bar to the establishment of any lien as against the building or land. We cannot perceive that she has lost any rights by the action of Wilson against Gardner. It is a fundamental principle that no one can be prejudiced by any legal proceeding to which he is not a party, and she need not defer action in asserting her rights until proceedings shall be instituted against her to acquire possession under a sheriff's sale and deed. The sale and deed would cast a cloud upon her title and she has a right to maintain this action to restrain the sale, and show that the judgment and decree is no lien as against her.

It is said, however, that Gardner, by the contract for the lien, waived the statute of limitations. Whether he could make such waiver binding upon the plaintiff, who was then a mortgagee of the land, we need not determine, because we do not think the contract amounted to a waiver, as between the parties thereto. The language relied upon is as follows: "I hereby agree that you shall have a mechanic's lien until the same is paid." But the contract also provides that payment was to be made March 1st, 1877. This is no waiver of the statute of limitations, either in terms or by implication.

It is urged that the conveyance from Gardner to the plaintiff was fraudulent and void, because there was a secret reservation by which Gardner had the right to redeem the land at any time prior to October 15, 1879, and in the meantime was to retain the possession thereof. It is a sufficient answer to this proposition to say that the consideration for the mortgage is in no way questioned, and the conveyance is not at-

Sweet, Dempster & Co. v. Oliver.

tacked by the pleadings as being fraudulent. It is not sought to be set aside. In short, there is nothing in either the pleadings or evidence warranting any attack upon the plaintiff's title as founded in fraud. The court below should have entered a decree perpetually enjoining a sale of the land under the judgment and decree against Gardner. Upon the plaintiff's appeal the decree dissolving the injunction will be reversed, and the cause will be remanded to the court below for a decree in harmony with this opinion, or at plaintiff's election such decree will be entered in this court.

REVERSED.

SWEET, DEMPSTER & Co. V. OLIVER ET AL.

1. **Equitable Jurisdiction: INJUNCTION: FORECLOSURE OF CHATTEL MORTGAGE.** The right to an injunction restraining the foreclosure of a chattel mortgage, and to a removal of the proceedings therefor into the Circuit or District Court, given by section 3317 of the Code, is not an absolute one, and does not exist where the applicant has a full and complete remedy in a pending action at law.

Appeal from Marshall Circuit Court.

SATURDAY, OCTOBER 22.

THE plaintiffs commenced an action against Mrs. A. E. Oliver, in which an attachment was issued and said Oliver's real estate and personal property attached, and Mrs. C. E. Webster garnished. Afterwards an amended petition was filed, reciting the matters aforesaid and stating that said Oliver had been engaged in business as a merchant, and had in her possession at the time the attachment was issued goods and merchandise of the value of about ten thousand dollars; that said Oliver had given to Mrs. Webster, at different times, mortgages on said merchandise and real estate to the amount of about twenty-one thousand dollars, among which

56 744
90 577
56 744
114 384

Sweet, Dempster & Co. v. Oliver.

was one for ten thousand dollars on said merchandise, which was fraudulent, having been given with intent to hinder and delay creditors; that Mrs. Webster had taken possession of said merchandise, and was proceeding to sell the same at private sale; that said Oliver was insolvent. The relief asked was that Mrs. Webster be made a defendant, and an injunction issue restraining her from applying the merchandise or proceeds thereof upon the amount claimed to be due her until it should be determined what amount was due, and whether the plaintiffs' claim should not be established as the superior lien on the merchandise; and if anything be found due said Webster that she be compelled to first exhaust the personal property before resorting to the real estate. An injunction was issued as prayed. Mrs. Webster appeared, filed an answer and motion to dissolve the injunction, which was over ruled, and she appeals.

J. M. Parker, for appellant.

Brown & Binford, for appellee.

SEEVERS, J.—It will be observed the petition does not allege the insolvency of Mrs. Webster. It is not deemed essential to set out at length the allegations of the answer. It being, we think, sufficient to state that it denies all fraud and asserts the mortgages were given to secure actual indebtedness or liabilities assumed by Mrs. Webster for the mortgagor. It was averred Mrs. Webster was solvent and able to pay any judgment that might be obtained against her as garnishee. Affidavits were read at the hearing to dissolve, but the allegation as to the solvency of Mrs. Webster was not controverted.

1. EQUITABLE
jurisdiction:
injunction:
foreclosure of
chattel mort-
gage.

The statute provides mortgages of personal property may be foreclosed by notice and sale without action in court, and that "the right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any one interested in so doing, and the proceeding may be transferred

Sweet, Dempster & Co. v. Oliver.

to the District or Circuit Court, for which purpose an injunction may issue if necessary." Code, § 3317.

Counsel for the appellee, in addition to the section just quoted, cite *Hanlin v. Parsons*, 33 Iowa, 207, and *Braith v. Guslick*, 37 Id., 212. In those cases there was no way of contesting the amount due or the right to foreclosure unless the proceeding to foreclose by notice and sale was transferred as the statute provides. Hence it was necessary to obtain an injunction to restrain the sale and make the transfer.

We do not believe the meaning and intent of the statute is that an injunction should issue and the transfer be made in all cases as a matter of right, but that it may be done when necessary to protect the rights of any one interested. If there is a full and complete remedy at law, then the general rule applies, that a resort to equity cannot be sanctioned.

It will be conceded that plaintiffs had two remedies, one being to garnish the mortgagee, and thus at law contest the amount due and the validity of the mortgage, or obtain an injunction and transfer the foreclosure proceeding, and thus in an equitable proceeding accomplish the same result. Instead of contenting themselves with either, the plaintiffs have adopted and insist on both. The garnishment proceeding was first in point of time, and afforded a full and complete remedy, and therefore a resort to equity cannot be had. The injunction was not necessary in order to afford the plaintiffs full and complete relief. The sale of the goods was not restrained because, as counsel states, they were being "sold to good advantage." An injunction restraining the application of the proceeds would not only be of no benefit as to Mrs. Webster if solvent, but positively injurious to all parties because interest would be accumulating while the money was lying idle.

There is no difference in principle between this case and *Silverman, Lindauer & Co. v. Kuhn*, 53 Iowa, 436. The action to dissolve the injunction should have been sustained.

Because conducing to brevity, nothing has been said as to

Bullis v. Marsh.

Hyde & Brothers, and we understand from the stipulation of the parties they are not in possession, and there is no reason why the whole matter at issue cannot be determined in the garnishment proceeding.

REVERSED.

BULLIS V. MARSH ET AL.

1. **Tax Deed: SALE EN MASSE: STATUTE OF LIMITATIONS.** The validity of a tax deed cannot be questioned, on the ground that it shows on its face that several tracts of land were sold in mass, after the expiration of five years from the date of its execution.
2. ———: **AS EVIDENCE: REGULARITY OF PROCEEDINGS.** A tax deed is conclusive evidence that the lands described therein were properly advertised for sale, and at least *prima facie* evidence that a proper adjournment was made to the day on which the sale took place. It is not essential that such adjournment should be shown by the records.
3. **Tax Sale: STATUTE OF LIMITATIONS: VOIDABLE SALE.** The legality of a tax sale which is voidable only cannot be sustained after the expiration of five years from the date of the execution of the deed thereon.
4. ———: **POSSESSION.** Where land remains unoccupied the title of the holder of a tax deed thereto becomes perfect at the expiration of five years from the date of its execution. Following *Moingona Coal Co. v. Blair*, 51 Iowa 447.
5. ———: **REGULARITY OF: EVIDENCE.** The fact that the tax sale register does not show an offering for sale of lands on the first Monday in October is not conclusive evidence that they were not so offered, nor sufficient to overcome the presumption in favor of the validity of a tax deed.

50	747
51	159
56	747
88	21
56	747
96	717

Appeal from Butler Circuit Court.

THURSDAY, JUNE 18.

THE plaintiff brings this action in equity to quiet his title to 140 acres of land, being the N $\frac{1}{2}$ N $\frac{1}{2}$ N W $\frac{1}{4}$ and S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ NW $\frac{1}{4}$, 2, 98, 12. The plaintiff claims title to said land through certain tax deeds. The defendant G. E. Marsh claims title to the land through purchase from the owner of the patent title. He alleges that

Bullis v. Marsh.

the tax title is void, and prays that his own title may be quieted. The court decreed that the plaintiff is the absolute owner of the property in controversy and quieted his title thereto. The defendant G. E. Marsh appeals.

H. T. Reed and Foreman & Marsh, for the appellant.

L. Bullis, pro se.

DAY, J.—The treasurer of Howard county, by deed executed and filed for record on the 17th day of May, 1866, and purporting to be in pursuance of a tax sale on April 29th, 1863, conveyed to McClure Cowan the SW $\frac{1}{4}$ of N W $\frac{1}{4}$ 2, 98, 12. At the same time, and purporting to be in pursuance of a tax sale held on the same day, the treasurer of Howard county conveyed to McClure Cowan the N $\frac{1}{2}$ N $\frac{1}{2}$ N W $\frac{1}{4}$ and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ 2, 98, 12. This deed also conveyed several other tracts in different sections, townships and ranges. The said treasurer by deed executed July 28, and filed for record August 6, 1869, and purporting to be in pursuance of a sale held on October 3d, 1864, conveyed to J. H. Easton the S $\frac{1}{2}$ of the N W $\frac{1}{4}$ of N W $\frac{1}{4}$ 2, 98, 12. These several deeds include all the lands in controversy. On the 10th day of September, 1869, McClure Cowan conveyed to W. Strother and L. Bullis by quit claim. Afterward, Strother quit claimed to Bullis. On July 10th, 1872, James H. Easton conveyed by special warranty to L. Bullis. In this manner Bullis became invested with the tax title to all the land in controversy. On the 28th day of April, 1871, the treasurer of Howard county executed to McClure Cowan two tax deeds, each purporting to be as a duplicate of the deed executed May 17, 1866, one conveying the N $\frac{1}{2}$ N $\frac{1}{2}$, NW $\frac{1}{4}$, and the other the SE $\frac{1}{4}$ NW $\frac{1}{4}$ 2, 98, 12. Bullis and his grantor have paid the taxes on the lands from 1869 to 1876, both inclusive.

On April 16, 1877, Austin Corbin, the holder of the patent title, conveyed the entire N W $\frac{1}{4}$ 2, 98, 12 to the defendant Marsh, and he claims title to the lands under this con-

Bullis v. Marsh.

veyance. The other defendants made default. The land was unoccupied until October, 1876, when the defendant Strodley took possession for Corbin, and had three or four furrows broken around the quarter and seven or eight acres across the east end. After the sale to Marsh one Patterson went into possession and broke about sixty acres. We will first consider the objections urged by the defendant to the plaintiff's title.

I. It is claimed that the title of the plaintiff to the $N\frac{1}{2}$ $N\frac{1}{2}$ and $SE\frac{1}{4}$ $NW\frac{1}{4}$ of the section in controversy, eighty

1. TAX DEED: acres, is invalid, because the deed conveying in-
 sale en masse: stat- cludes ten distinct parcels of land *en masse* for
 ute of limita- the gross sum of \$112.89. This deed was exe-
 tions. cuted and recorded on the 17th day of May, 1866. This ac-

tion was commenced on the 21st day of August, 1877, more than ten years after the recording of the tax deed. In *Thomas v. Stickle*, 32 Iowa, 71, it was held that under § 790 of the Revision, 902 of the Code of 1873, no objection to the validity of a tax title can be made on the ground that the deed shows upon its face that several tracts of land were sold for a gross sum, after the expiration of five years from the time of the sale. To the same effect see also *Douglass v. Tullock*, 34 Iowa, 262. These cases dispose of the question that the deed shows a sale *en masse*, and obviates the necessity of considering the effect of the deeds executed April 28, 1871.

II. It is urged that the alleged tax sale of April 29, 1863, upon which plaintiff bases his title to one
 2 ———: as hundred and twenty acres of the land in contro-
 evidence: versy, was in fact and law no sale.
 regularity of proceedings.

1. It is urged that there was no advertisement of the sale as required in § 764 of the Revision. The tax deed is conclusive evidence of the advertisement. See *Madson v. Sexton*, 37 Iowa, 562, and cases cited.

2. It is claimed that there could have been no legal sale on April 29th, 1863, because there was no regular sale on the first Monday in October, 1862, from which an adjourn-

Bulls v. Marsh.

ment could be made. The evidence does not show that the delinquent lands were not regularly offered for sale on the first Monday in October, 1862, nor that there was not a regular adjournment at that time. The only evidence upon that point is the testimony of one who was clerk of the board of supervisors, as follows: "I don't remember of any what you might call *regular* sale in 1861 or 1862. There were some sales to a few individuals during various times.

3. The evidence shows that after the first Monday in October, 1862, sales occurred at intervals of less than two months, until the sale occurred under which the plaintiff claims. It is objected that the register of sales contains no note of any adjournment of any of the sales. It is not necessary that the record should show an adjournment of the sale where the sale occurs at a time other than the first Monday in October. The deed is at least *prima facie* evidence of the regularity of the proceedings in this respect. *Easton v. Savery*, 44 Iowa, 654; *Eldridge v. Kuehl*, 27 Id., 160; *Sully v. Kuehl*, 30 Iowa, 275; *Love v. Welch*, 33 Id., 192; *Lorain v. Smith*, 37 Id., 67.

4. The evidence shows that after the regular sale in October, it was customary for the treasurer to keep the sale open from day to day, in order that any one who desired might come in and make selections, which were entered up sold. The tax sale register shows a sale to McClure Cowan, April 29, 1863, of 12,963 acres. The evidence does not show in what manner the sale was conducted on that day. It is claimed by appellant that the facts bring the case within the doctrine of *Butler v. Delano*, 42 Iowa, 350; *Thompson v. Ware*, 43 Iowa, 455; and *Miller v. Corbin*, 46 Id., 150. In those cases it was affirmatively shown that there was no adjournment of the sale to the day named, and that there was no public offering of the lands. These facts do not affirmatively appear in this case. The case comes more nearly within the doctrine of *Leavitt v. Watson*, 37 Iowa, 93. The *prima facie* case made by the deed is not rebutted, and more

Bulls v. Marsh.

especially is this so in view of the fact that more than five years had elapsed since the completion of the sale.

III. It is objected that the sale of October 3d, 1864, upon which plaintiff bases title to the S $\frac{1}{2}$ N W 40, was a ring sale and fraudulent. In *Van Shaack v. Robbins*, 36 Iowa, 201, it was held that a ring sale is not void, but voidable only. If the sale was merely voidable, it cannot, under the doctrine of the authorities already cited, be questioned after the lapse of five years from the completion of the sale.

IV. We now come to a consideration of the affirmative relief asked by the plaintiff. The evidence shows that for 4. —; —; more than five years after the execution and recording of the tax deeds under which the plaintiff claims title, the land was unimproved and wholly unoccupied. In *Moingona Coal Co. v. Blair*, 51 Iowa, 447, it was held by a majority of this court that if the owner of the patent title does not take possession during the period of limitation, and the land during that time remains unoccupied, the title of the holder of the tax deed becomes perfect at the expiration of that period.

This case is decisive of the right of the plaintiff to the affirmative relief asked. See also *Lewis v. Soule*.

AFFIRMED.

ON REHEARING.

Within the time prescribed by rule of court a petition for rehearing was filed. The only point made in the petition for rehearing which we deem it necessary to notice is the claim that the petition fails to consider the fact that the tax sale register was introduced in evidence, and fails to show any offering of the lands for sale on the first Monday in October, 1862. The appellant cites and relies upon *Chandler v. Keeler*, 46 Iowa, 596. This case simply holds that the tax sale register is admissible in evi-

5. —; regu-
larity of
evidence.

Bullis v. Marsh.

dence as a circumstance tending to show that there was no adjournment, if no adjournment is shown upon it. The weight and effect of such evidence is not determined. We are of opinion that the silence of the tax sale register as to an offering of the lands on the first Monday in October, taken in connection with the other evidence in this case, does not overcome the *prima facie* evidence of regularity arising out of the production of the deed. The petition for rehearing is overruled.

APPENDIX.

NOTES OF CASES NOT OTHERWISE REPORTED.

ROBINSON BROS. & GIFFORD V. POE ET AL.

PROMISSORY NOTE: TRANSFER OF: EVIDENCE CONSIDERED.

Appeal from Harrison District Court.

FRIDAY, APRIL 22.

ACTION upon a promissory note. The cause was tried to the court without a jury, and judgment rendered for defendants. Plaintiffs appeal.

Barnhart & Cadwell, for appellants.

No appearance for appellee.

BECK, J.—I. The note in suit is negotiable, and was transferred to plaintiffs before maturity. The defense pleaded to the action is that the defendants paid the note to the payees before its transfer to plaintiffs, and that it was transferred as collateral security for the debt of the payees to the plaintiffs.

The plaintiffs in their reply admit that the note was transferred to them as collateral security, but allege that the transfer was made in consideration of an extension of time upon the debt for which the note was taken as collateral security. Other allegations of the answer are denied in plaintiff's reply. The pleadings raise issues, and no others, involving the payment of the note before its transfer, and a contract to extend time to the indorsers upon their debt to plaintiffs. These issues the court found for defendant. No questions other than those involved in the court's findings of facts are presented in the case.

II. The evidence relating to the payment of the note in suit before its transfer is all one way, and there is no contradictory evidence upon this point. Upon the question whether an extension of time was given to the indorsers upon the transfer of the note as collateral security, there is conflict in the evidence. One of the indorsers who transacted the business testifies that no contract for extension was made. One of plaintiffs states in his tes-

timony that there was such a contract. It was the province of the court to weigh this conflicting evidence. It seems that the testimony of the indorsers outweighed the plaintiff's evidence in the mind of the court below. We cannot say that the court erred in his estimate of the testimony. Certain it is we find no such absence of proof in support of the court's findings which, under the familiar rules prevailing here, will authorize us to reverse the judgment on the ground that it is unsupported by the evidence.

AFFIRMED.

MADAR V. VEERS.

CONTRACT: VENDOR AND VENDEE: EVIDENCE CONSIDERED.

Appeal from Montgomery District Court.

FRIDAY, JUNE 10.

ACTION in equity to recover the balance of the purchase-money of certain land and personal property sold by the plaintiff to the defendant. The petition prays that the judgment for so much of the purchase-money as is due for the land be established as a vendor's lien upon the land. The defendant admits the purchase of the property, and admits that the purchase-price is correctly stated, but avers that the plaintiff has been paid in full. There was a decree for the plaintiff. The defendant appeals.

C. E. Richards, Smith McPherson, and C. S. Murphy, for appellant.

Miller & Bartholomew, for appellee.

ADAMS, CH. J.—The plaintiff received for the balance of the purchase-money in question three promissory notes executed by one Charles Tulley and wife. The defendant claims that these notes were received as payment. The plaintiff avers in his petition that he was induced to receive the notes by the false representations of the defendant in regard to the responsibility of the makers thereof. He also avers that "said notes were to be secured by a first mortgage upon certain real estate in Montgomery county, Iowa, known as the Tulley farm." The defendant denies the false representations, and denies that the notes were to be secured by a mortgage.

The evidence shows that the Tulleys were new-comers in Montgomery county, where the trade was made; that the plaintiff hesitated about taking the notes; that the defendant represented to him that the Tulleys were good; that Charles Tulley was worth a million of dollars. Tulley was examined in regard to his property, and testified that he had a bond for a deed of ninety acres of land upon which he had paid nothing, and that he owned a team, a cow, a plow and a harrow. He also testified that his wife owned an undivided interest in some land in Wisconsin, which interest he estimated to be worth about \$1,500. The notes in question amount without interest to \$874.

Such being the evidence in regard to the responsibility of the Tulleys, we are not quite prepared to say that the fraud of the defendant was such as to preclude him from setting up the receipt of the notes by plaintiff as constituting payment.

If, however, it was a part of the trade that the plaintiff was to have a mortgage upon specific land to secure the notes, and such mortgage has not been given, it was the plaintiff's right, we think, to surrender the notes, and demand the payment of the balance of the purchase-price of the property in money. There is no evidence upon the plaintiff's part that the mortgage was not given, but it seems to be conceded that it was not, and no question is raised upon that point. There is no evidence nor averment that the plaintiff surrendered or offered to surrender the notes to the defendant, except that he brings the notes into court to be delivered to the defendant. But no question is raised upon that point.

The principal question discussed, and one upon which we think the case must turn, is as to whether there was an agreement that the notes should be secured by a mortgage, as the plaintiff alleges. Upon this point there is a very sharp conflict in the testimony. The plaintiff testifies that there was such agreement, and the defendant testifies as positively that there was not. Each party is corroborated by witnesses who were present when the trade was made. Supposing all the corroborating witnesses to be honest and intelligent, the natural conclusion would be, in the absence of any facts or circumstances tending to lead to a different conclusion, that there was such agreement, but that the defendant's witnesses failed to hear it, or forgot it. We see very little, if anything, tending to impugn the honesty of the corroborating witnesses.

As to the honesty of the defendant we have to say that it seems to us that he has impeached himself. According to his own testimony he told the plaintiff what was not true. He says: "As a matter of fact the Tulley notes were secured in my hands, but I told Madar they were not." We must be permitted to doubt whether he did tell him so, because we can see no motive for telling him so, it not being true, and the statement if made was not only false, but in disparagement of the property which he was trying to trade off. Again, he is contradicted by one Vetter, who was present at the trade. The Tulley notes, it appears, had been given for land sold by the defendant to Tulley, and defendant retained the legal title as security. Vetter testifies that "the defendant said that he had only given a bond on the land, and that it would be better for Madar to take a mortgage, and then if the notes were not paid he could get the land." But it is not material whether the defendant told plaintiff that the notes were secured. If he did so tell him, he told him what he knew was not true, and if he did not so tell him, then he testifies to what is not true, and in either event his credibility as a witness is impaired.

Again, it is made to appear very clearly that the defendant intended to wrong the plaintiff. One Clark testifies (and his testimony seems to be undisputed) that some time after the trade he said to the defendant "I guess you combed Madar pretty hard." He said he had a trade with Madar once before, and Madar went back on him, and he made up his mind that if he ever got hold of him he would skin him, and he had done it. There is no

pretense or suggestion that the purchase-price was not a fair one. If, then, the defendant skinned the plaintiff, it must have been by reason of the character of the notes and their security. Possibly the notes are still secured in such a way that the plaintiff might avail himself of the security. The defendant insists that as the plaintiff took the notes with security, he has no ground of complaint. In what condition the security now is the record does not show further than that the bond has been burned. Whether the security is still available to the plaintiff we need not inquire. No one would deny that the notes would not be more valuable to the plaintiff if secured by a mortgage which he could hold and control than if merely secured by reason of the fact, if such is the fact, that the defendant holds the legal title to the land for which the notes were given.

We reach the conclusion that the defendant agreed that the notes should be secured by a mortgage, and that he failed to keep his agreement, intending that the plaintiff should be remitted solely to the personal responsibility of the makers of the notes. If so, the plaintiff was not bound to retain the notes as payment. That part of the trade whereby the defendant was to pay the plaintiff by these notes was not fully executed upon the defendant's part; something remained to be done which was to give value to the notes in the plaintiff's hands. In our opinion the decree of the District Court must be

AFFIRMED.

DRESSEN ET AL. V. BRAMEIER ET AL.

CORPORATION: CHURCH ORGANIZATION.

Appeal from Muscatine District Court.

SATURDAY, JUNE 11.

THE Evangelical Lutheran Salem's Church is a corporation existing under the laws of Iowa. In pursuance of the articles of incorporation, and for the purpose of providing the congregation religious and educational privileges, certain real estate was purchased on which was erected a church and other buildings suitable for said purposes. The plaintiffs claim they were duly elected trustees or members of the church council, and as such they are vested with the power and right to control the use of said property. The defendants claim they are the trustees, and as such are vested with the power aforesaid. This is an action in equity brought to determine such contention. The District Court found for the plaintiffs, and entered a decree accordingly. The defendants appeal.

C. Koener and Richman & Carskaddon, for appellants.

Brannan, Jayne & Wilson and Green & Peters, for appellees.

SEEVERS, J.—The articles of incorporation were adopted and filed for record in 1858, and we infer there were adopted at the same time what are denominated a constitution and church regulations. Whether such constitution and regulations form a part of the recorded articles of incorporation we are not sure, but this is believed to be immaterial, because counsel on both sides seem to concede they are of equal validity in the determination of this controversy. We are therefore relieved from stating the reasons for concluding the constitution and regulations are entitled to consideration in the examination of the question before us. As conducting to brevity we shall, when required, speak of the constitution, intending thereby, however, to include not only that instrument and the regulations, but the articles of incorporation.

In 1875 the members of the church and corporation divided, and formed themselves into two distinct bodies, as hereafter stated, and each claiming to be the true church and corporation, both elected trustees to control the use of the property. One party has excluded the other from church privileges, except, as we understand, the excluded party will conform to the rules, regulations and doctrine prescribed by the other. This is the controversy we have to determine.

Briefly stated, the constitution provides that the congregation believe in and is to be governed by the rules, usages and doctrines of the Evangelical Lutheran Church, and as long as three or more members adhere to the faith and practice of the constitution, they shall have the right and power to take possession of all property of the congregation upon the condition they endeavor to preserve it undiminished for the Evangelical Lutheran Church in North America.

The usages of Lutheran churches or congregations, as we understand, are that each congregation is, or may be, supreme. There are synods and conferences, but a congregation may or may not unite therewith and yet be a true Lutheran congregation to all intents and purposes. Nor is a congregation bound to unite with a synod in the same State; so that although there may be a synod in Iowa, a Lutheran congregation may join a synod in Illinois, or any other State. It is regarded as doubtful whether any formal action by the congregation is required in the first instance in order to join any synod. There seems to be no doubt if the pastor of a congregation joins a synod, and so informs the congregation, and no dissent is expressed, and the congregation makes reports and sends delegates to the synod, or in any other reasonably clear manner acknowledges the authority and claims the advantages arising from the connection, it is deemed to have joined the synod. Notwithstanding a congregation may have joined a synod, it remains supreme so far as the right to manage and control its property is concerned. The only clearly defined power of the synod, we understand, is that of visitation and expulsion if the congregation does not believe and practice the faith and doctrine of the synod.

The constitution of the Salem's Church provides: "To avoid a separate position, and to secure the existence of the congregation the better, and to give a hand to the building up of the Evangelical Lutheran Church of North America, the congregation shall with their pastor join an Evangelical Lutheran Synod."

Previous to 1867 the pastor, Rev. William T. Strobal, and the congregation belonged to the English Iowa Synod. In that year both the pastor and congregation withdrew, or at their request were dismissed from said synod. No formal action in relation to the withdrawal was taken by the congregation, but the result was as above stated, although all that was done was by the pastor, and the congregation simply acquiesced therein upon being informed by the pastor of his action.

Shortly thereafter the pastor joined the German Lutheran Synod of Iowa, and was accepted as a member thereof. No formal application was made by the congregation, nor by the pastor in their behalf, to join the synod, but from that time until 1875, a period of about seven years, both the congregation and synod by their acts and conduct clearly, we think, acknowledged the congregation had joined said synod. Upon joining a synod a congregation has the right to send, if it chooses to do so, a lay delegate to the synod. This right was exercised at least on one occasion, and the delegate exercised the usual rights and privileges. Reports of the state and condition of the congregation were sent to the synod, and contributions made to charitable institutions within the jurisdiction of the synod.

We find from the evidence just stated that the congregation of the Salem's Church, by affirmative acts, became and were recognized as having joined the Iowa Synod, for about seven years; that the connection thus formed was formal and not informal, because of the fact the pastor had become a member of the synod. There is much testimony tending to show that a congregation may become a member of a synod upon their pastor joining the same, without any action on the part of the congregation. In such case it is said the withdrawal of the pastor amounts to a withdrawal of the congregation, and that the latter ceases to belong to the synod whenever the pastor does. We have seen, however, the constitution requires that both the congregation and pastor shall join the same synod. This implies there shall be affirmative action by each. But whether this be so or not, the congregation did join the synod in a manner which is recognized and sufficient under the rules and usages of the Lutheran Church. This being so, we do not think under the evidence the withdrawal of the pastor in such case amounts to a withdrawal of the congregation. In view of the constitutional requirement, the connection should be severed by some unmistakable act which evinces the intent of the congregation. The ceasing to do and perform synodal relations would, without doubt, be sufficient. The pastor withdrew from the synod about the first of June, 1875, but the congregation, as we think, did not by that act cease to be a member of the synod.

On June 6, 1875, the pastor, before or at the conclusion of services at the church, read a paper and made oral statements of the causes which induced him to take such action. There is a serious conflict in the evidence as to what took place, or as to what was read or stated by the pastor, but we have concluded in order to avoid stating our reasons at some length as to in whose favor the evidence preponderates, to concede that the material fact was as the pastor states, and as he testifies. He stated on that occasion to the congregation: "I would have to resign if they would not dissolve their relations with the Iowa Synod. * * I stated that if even one only was dissatisfied, we must have a meeting, and I requested them to let me know

within eight days, and that if during that time no one expressed his dissatisfaction, I would look upon it as if they would go with me."

It is quite evident that Mr. Strobel at that time, although he had ceased to be a member of the Iowa Synod, regarded the congregation as still belonging thereto, and that it required some action, or at least acquiescence in what he had done, so that his act became the act of the congregation in order to dissolve the connection. Now, we think from the evidence that many members of the congregation did not understand Mr. Strobel to state he would regard the congregation as having left the synod, unless they expressed themselves otherwise within eight days.

The Rev. Strobel further testifies: "One week later, on June 13, we had service. I then from the pulpit announced that no one had come to me and let me know there was any dissatisfaction with my withdrawal from the synod, and as not even one let me know, I thought they would dissolve their relation to the Iowa Synod, and knowing this, I would write to the president of the synod, and state the facts, and how we proceeded." From the foregoing it is apparent, *First*, that Mr. Strobel did not have reference to the withdrawal of the congregation from the synod, but his own action in that respect was the matter as to which one of the congregation had not expressed dissatisfaction; *Second*, from the foregoing, it is further apparent that individual dissatisfaction instead of congregational was what he expected or asked for, and *Third*, that the congregation "would dissolve their relation to the Iowa Synod," and not that this had been done.

In October following the church was dedicated, and there were present several ministers who had withdrawn from the synod at the same time the Rev. Strobel did. There was a conference of the ministers held for the purpose of "reconsidering the reasons of our withdrawal from the Iowa synod," as Mr. Strobel testifies. But we do not understand this conference was attended by the congregation generally. Up to this time no act had been done by the congregation indicating the connection with the synod should be dissolved. When called upon to state whether they were dissatisfied with the action of their pastor, the members were asked to act as individuals, each for himself. Now, we think the fact the members kept silent should not be construed as congregational assent or approval of what the pastor did. If the pastor desired to ascertain the views of the congregation, he should have called them together for that purpose; this, however, was not done.

In January or February, 1876, Peter Hien, a member of the congregation, claims to have made the discovery the pastor was endeavoring to dissolve the connection between the congregation and the Iowa Synod, and force the former to unite with the synod of Missouri. The result was the pastor called upon Hien, an altercation ensued, charges were made by the pastor against Hien, and by the latter against the pastor. These charges, if reduced to writing, have been lost, and as to what matters were embraced therein, material to the matter in hand, is a subject of controversy.

A meeting of the congregation was duly called on February 20, 1876, to consider said charges. The pastor presided at the meeting, and much evidence has been introduced as to whether an officer of the synod had a right to be present and speak or advise as to the matters before the meeting. But we do not regard this as material, and, therefore, omit further reference

thereto. During the meeting the question was proposed whether the congregation would remain with the Iowa Synod. The vote was by ballot, and there were fifteen votes in the affirmative and twelve in the negative, and it was so announced by the president, the Rev. Mr. Strobel, whereupon the latter declared in substance that he resigned the pastorate, and would not perform any of its duties. He gave the minute book to the secretary, and left the meeting. Mr. Strobel does not deny he resigned, but states he did so with a mental reservation. One or more of the trustees also resigned and left the meeting with Strobel, and ever since then the theretofore united congregation has been disunited, each claiming to be the true congregation. The defendants have been elected trustees by the followers of the pastor.

The vote above stated was fair in every respect; at least nothing indicating otherwise appears from the evidence. It will be seen the plaintiffs represent a majority of the congregation, and the question is whether they or the representatives of the minority can control the use of the corporate property. It is said the vote above stated was not a legal expression of the will of the congregation, because the subject-matter thereof was not embraced in the call for the meeting. The evidence warrants the conclusion, we think, that one of the charges preferred by Hien against the pastor was that he was endeavoring to dissolve the connection between the congregation and the Iowa Synod, and this being so, it was proper for the congregation to express its wishes in this regard. But whether this be so or not, we are thereby informed as to the wishes of the majority, and do not think their wish should be disregarded, as it is not contradicted by any act of the congregation either before or since that time.

It is maintained by the defendants that the Iowa Synod has departed from the Lutheran faith and doctrines, and that as the majority have signified their intent to continue the synodal relations therewith, that said majority no longer represents the true church, and, therefore, is not under the constitution entitled through trustees elected by said majority to control the use of the property. It will be observed the dispute between the majority and minority is solely in relation to the synodal connection of the congregation. Several learned divines have testified the Iowa Synod does not conform to the Lutheran faith and doctrine, and does not believe them. Apparently equally learned divines have testified it does. We have read this evidence with much interest, and simply desire to say that conceding it is our province to determine this question, we with some doubt conclude the Iowa Synod has not departed from the Lutheran faith and doctrine. To state our reasons would greatly enlarge this opinion, and no one engaged in this controversy would be convinced thereby.

The constitution of the Salem's Church provides that "to constitute a quorum to carry a valid resolution, at least one-half of the members must be present during the proceedings, but for a valid resolution the absolute majority of those present is necessary." There were present and voting more than a quorum when the resolution was passed adhering to the Iowa Synod. The foregoing provision clearly provides a majority of the congregation shall determine whether the corporation shall or shall not adopt any resolution or proposition which legitimately comes before it. It must be remembered the constitution provides the congregation and pastor shall join

some synod. In accordance with this provision both joined the Iowa Synod. The pastor alone withdrew therefrom. He, therefore, ceased in a constitutional sense to be the pastor of said congregation. He made endeavors to get the congregation to dissolve the connection with the Iowa Synod. Instead of so doing, the congregation determined to remain with said synod. Thereupon the Rev. Strobel resigned the pastorate, and declared in language which need not be repeated here, that he never would unite with the Iowa Synod. A minority of the congregation are followers of the Rev. Strobel, and insist they, against the will of the majority, should control the property. In this we do not concur, but on the contrary regard the rule as well established that the will of the majority must prevail. This rule applies to all corporations, whether religious or secular, as long as the former conform to the faith of the church. The minority, when they became members of the corporation, bound themselves to be governed by the will of the majority, unless the articles of incorporation otherwise provide.

It is claimed the plaintiffs are not the legal trustees; that is, they have not been elected at the proper time by the majority, but we think otherwise. It is also said the followers of the Rev. Strobel are now more numerous than the other party, but this is not material, nor the essential fact that his followers paid more for church purposes than the other party.

In *Ferraria et al. v. Vasconcellos et al.*, 31 Ill., 25, the facts in some respects are like those in the case before us. In the case cited, an accounting was directed, and an equitable division of the property made between the two factions. The defendants ask that this be done in the case at bar. The material distinction between the two cases is this: In the one cited, the title to the property was vested in trustees for the use of the members of the congregation. Here it is vested in the corporation, and we cannot direct an accounting and a division of the property, by sale or otherwise, without dissolving the corporation, and we do not think any such relief is asked. If the title to the property in the Illinois case had been vested in a corporation, we have grave doubts whether an accounting would have been ordered under the record before the court.

AFFIRMED.

HULL & JULIUS V. HOBBS.

ACCOUNT: EVIDENCE CONSIDERED.

Appeal from Cherokee District Court.

SATURDAY, JUNE 11.

ACTION upon a balance of an account for goods alleged to have been sold by plaintiffs to the defendant, amounting to \$435.63. The defendant admits the purchase of a portion of the goods embraced in the account, but avers that they have been paid for. The other goods embraced in the account he

denies purchasing. There was a trial by jury, and a verdict and judgment were rendered for the plaintiffs for \$21.95. They appeal.

Theodore Hawley, for appellants.

No appearance for appellee.

ADAMS, CH. J.—The plaintiffs have for several years been doing business as merchants, at Fort Dodge. The defendant has for several years been doing business at Sac City. In 1874 the people of Sac City desired to have a tailor shop opened at their place, and induced one Thomas, a tailor, to open such shop. But Thomas was without means or credit. The defendant, in order to assist him, and thereby secure the establishment of the shop, purchased for him of the plaintiffs nearly \$500 worth of goods, as the defendant himself admits. Afterward Thomas selected other goods, which were shipped to Sac City, and charged to the defendant upon the supposition that they were sold to him, and were to be paid for by him. Whether the defendant purchased these subsequent goods is the question in controversy. The errors assigned relate mostly to the admission of evidence.

While Mr. Julius, one of the plaintiffs, was being examined as a witness in their behalf, the defendant was allowed to ask him, against the plaintiff's objection, a question in these words: "Did you understand at that time that it was Mr. Hobbs that was starting a tailor shop at Sac City, or Mr. Thomas?" The witness answered: "I understood that Mr. Hobbs and Mr. Thomas were, that is that Mr. Thomas was to do the work, and Mr. Hobbs to furnish the goods." This answer, it appears to us, was in accordance with the plaintiff's theory, and rather tended to support their claim than otherwise. We do not see that they have any ground of complaint.

The defendant was allowed to ask the same witness another question against the objection of the plaintiffs, which is in these words: "Did you understand that Mr. Hobbs was to go into partnership with Mr. Thomas in running the store out there?" The witness answered: "I could not tell you whether they were partners or not." The plaintiffs were not prejudiced by this answer, because it showed nothing.

Mr. Hull, one of the plaintiffs, was being examined as a witness in their behalf, and volunteered the remark that he wrote defendant a letter recommending Thomas as a good man to start a tailor shop. Thereupon the plaintiffs moved to strike out the testimony, and the court overruled the motion. We are unable to see that they were prejudiced by this testimony. On cross-examination the same witness was asked, and testified as follows against the plaintiff's objections:

"Int. Well, then, did you think that by selling the goods at almost cost to Mr. Hobbs, that you were helping Thomas? Ans. I did.

"Int. How was that to help Thomas? Ans. Because I called myself a special friend of Mr. Thomas."

If we could regard this testimony as unfavorable to the plaintiffs, we should have to say that we think that it was properly elicited upon cross-examination. The same witness was asked on cross-examination, against the plaintiff's objection, if he did not consider the defendant a man of means, and

able to pay what he owed, and he answered in substance that he did. There is nothing in this inconsistent with their theory that the defendant bought the goods to aid Thomas, nor do we think that it could have been understood by the jury as having any tendency to show that the plaintiffs charged the goods to the defendant because he was able to pay for them, and not because he bought them. The testimony, we think, was without prejudice.

The defendant was allowed to testify, against the plaintiff's objection, as follows: "Mr. Thomas wanted to come there to start a tailor shop. We were anxious to have him come. He said he had no means, and if somebody would help him, and give him a start, he would pay it all back, and talked around among our people there. They said that it would be a good thing. He came very well recommended from Ft. Dodge, and I told him that I would get him a small stock to start on. I had no ready money, and if he could get a little time I would buy some goods, or assist him." Why the plaintiffs should object to this testimony, we are unable to see. So far as it goes, it seems to be precisely in accordance with their theory. The defendant doubtless made the statement for the purpose of explaining why he bought for Thomas what he admits he bought, but certainly the plaintiffs cannot properly complain of that.

We cannot properly extend this opinion by noticing in detail all the minute points made in the plaintiff's argument. We must be allowed to say in a general way that while it appears to us that evidence was admitted which was not material, yet it is not pointed out wherein the same was prejudicial, and we are all agreed upon a separate reading that it was not prejudicial. It is objected that the verdict is not sustained by the evidence, yet it is admitted that the evidence is conflicting. In such case we cannot disturb the verdict.

AFFIRMED.

ÆTNA LIFE INSURANCE COMPANY V. SMITH ET AL.

PRACTICE IN THE SUPREME COURT: ABSTRACT: EVIDENCE.

Appeal from Linn Circuit Court.

FRIDAY, JUNE 17.

ACTION to foreclose a mortgage executed to the plaintiff by the defendants Jackson Smith and Elizabeth Smith, his wife. After the commencement of the action Jackson Smith died intestate. Administrators were appointed upon his estate, and substituted. The heirs were also brought in, and made defendants by way of substitution. Among the heirs thus brought in and made defendants, is Charity Hite. The defendant F. M. Hite is her husband. It appears from the petition, as an additional reason for bringing them in, that they claim an interest in the premises by conveyances from Jackson Smith in his lifetime. No answer having been filed by the Hites, they were adjudged to be in default. A decree was rendered that the premises be sold

without redemption, and that in case any of the defendants should refuse to give immediate possession of the premises, and of the crops growing thereon, the clerk should issue a writ of ejectment to remove such persons, and put the purchaser in possession. From this decree the Hites appeal.

J. B. Young, for appellants.

J. W. Ball, for appellee.

- ADAMS, CH., J.—No evidence is set out in appellant's abstract, nor is it stated that no evidence was introduced. The appellee contends that in the absence of the evidence there is nothing before us for determination. The appellee, it is true, sets out a stipulation purporting to be made between its attorneys and the attorneys for the administrators, but the appellee disclaims supplying the deficiency in the appellant's abstract.

The decree purports to have been made upon an agreement of all the parties. If it was, it was made upon an agreement of the Hites. The fact that they failed to answer, and were adjudged to be in default, is not necessarily inconsistent with such idea. Every reasonable presumption must be indulged in support of the decree. In the condition of the record, we think that it must be

AFFIRMED.

WILSON V. KLOKENTEGGER ET AL.

PRACTICE IN THE SUPREME COURT: ASSIGNMENT OF ERRORS: INSUFFICIENCY OF.

Appeal from Superior Court of Cedar Rapids.

SATURDAY, JUNE 18.

ACTION upon a promissory note. There was a verdict and judgment for defendants. Plaintiff appeals.

George W. Wilson and *J. G. Rice*, for appellant.

No appearance for appellee.

BECK, J.—The assignment of errors is in the following language: "Plaintiff and appellant refers to the errors assigned in the motion for a new trial and as discussed in the argument, for her assignment of errors in this case." The grounds of the motion for a new trial are here designated as "errors assigned." And only such of these grounds of the motion for a new trial as are discussed in the argument are assigned for errors. Counsel in their assignment designate, by reference to their argument, the errors relied upon. When these are discovered, a further reference is required to the

grounds of the motion for a new trial, before it can be determined what points are really covered by the assignment. The grounds of the motion for a new trial cover objections to rulings permitting amendments to pleadings, to decisions overruling a demurrer, overruling objections to the jury, admitting and excluding evidence, requiring plaintiff to go to trial against his objections, giving and refusing instructions and also objections to the verdict as being unsupported by the testimony, and other matters. A part only of these objections were urged in argument.

Code, section 3207, provides that "an assignment of error need follow no stated form, but must, in a way as specific as the case will allow, point out the very error objected to." The assignment of errors in this case clearly fails to comply with this requirement. Instead of pointing out the errors complained of "in a way as specific as the case will allow," we think a more indefinite and obscure method could not be pursued. We cannot sanction such a violation of the statute and give countenance to a practice which excuses an appellant from stating clearly and specifically the very objections upon which he relies for a reversal of the case. The practice in this court, as prescribed by the statute and rules here recognized, is simple and readily understood by all. It requires the direct and plain presentation of all questions brought here for determination. Fairness to the parties and the court, and the correct administration of justice, demand that it be pursued in all cases.

The assignment of errors being insufficient there are no questions in the case for decision.

AFFIRMED.

BOYLE V. THE C., R. I. & P. R. Co.

Appeal from Marion Circuit Court.

RAILROADS: NEGLIGENCE: EVIDENCE CONSIDERED.

TUESDAY, JUNE 20.

THE plaintiff is a laborer and an employe of the defendant. He was a shoveller and working in connection with a gravel or construction train. His duty required him to accompany the train and aid in loading and unloading the cars composing the train. The cars were known as flats. When they were loaded it was the duty of the plaintiff to get aboard and go with the train to where it was to be unloaded. The petition alleges that when engaged in loading said cars the conductor of the train directed the plaintiff and others to get aboard as the train was about to be moved; "that in obedience to said order he was getting on such train, climbing on the rear of one of the construction cars, when just as he was climbing on said car the locomotive which moved said train moved back without giving signal by ringing the bell or otherwise, and suddenly pushing the car plaintiff was climbing on back against another car, caught the plaintiff's foot and ankle, whereby he was greatly injured" without fault or negligence on plaintiff's part.

The defendant pleaded that it was not negligent, and that plaintiff was guilty of contributory negligence. Trial by jury, verdict and judgment for plaintiff, and defendant appeals.

Anderson & Kincaid and Thos. F. Withrow, for appellant

John F. Lacey and James D. Gamble, for appellee.

SEEVERS J.—I. No objection is made to the instructions and the cause was fairly and fully submitted to the jury. Counsel for the appellant seek a reversal on the following grounds: first, "the evidence shows by an overwhelming preponderance that there was no negligence in the movement of the engine, as ample time was given plaintiff to mount the train before the coupling was made;" second, the evidence of plaintiff and all of the circumstances show that he was guilty of negligence contributing directly to the injury which he received."

The act of negligence relied on in the petition is the failure to ring the bell or otherwise warn the employes the engine was about to be connected with the same at the time plaintiff was making the attempt to get aboard.

There was evidence tending to show the usual custom was to ring the bell on such occasions, and whether this was done was a controverted question. There were several witnesses who testified they did not hear the bell, the plaintiff being one of said witnesses. If it had been rung the probability is they would have heard it. At least it was a question for the jury to say whether they could have heard it or not. There were other witnesses who testified the bell was rung. There was, therefore, a conflict in the evidence as to this question, and it is not for us to say the preponderance was with the defendant. If it was we cannot for that reason reverse the judgment.

The court in substance instructed the jury that if they found the bell was not rung, and the failure to do so was the cause of the accident, it was for them to say whether under all the circumstances the failure to ring the bell was the cause of the accident. This instruction being the law of this case, and as the jury found for the plaintiff, it is evident they determined the conflict above stated in his favor. It may be, as claimed by counsel, the preponderance of the evidence is with the defendant, but the jury have found otherwise, and as has been repeatedly held we cannot in such case interfere.

II. There was evidence tending to show the engine had been disconnected from the train or cars some time previous to the accident, and had been moved to a station for a temporary purpose. It was returning for the purpose of moving the train and was stopped a short distance from the car to which it was to be coupled. There was a storm approaching, and the conductor was anxious to get the train moved. Before the engine was attached he gave the order to the plaintiff and other employes to get aboard. There were no conveniences for getting on the cars. Counsel for appellant state that some persons "place a hand upon each car, one foot on the platform and spring; others place a hand upon each car, a foot on the dead wood and spring; others climb up the brake when available, and others yet get on the side of the car, when the circumstances are favorable." The evidence tended to show the plaintiff made the attempt to put his foot on the dead wood, but as we understand he in fact placed it on the draw bar and it slip-

ped and was resting on the link between the draw bars at the time the engine came against the forward car for the purpose of being coupled thereto. This caused the draw bars to suddenly come together and the plaintiff's foot and ankle were more or less crushed.

It is said that any one who places his foot on the draw bars or link at a time when he has good reason to believe there may be a sudden movement of the train is guilty of contributory negligence. We are not prepared to assent to this broad and unqualified proposition, but think it was for the jury to say under all the circumstances, such as the haste required to get aboard; the condition of the ground or approaches; and the character of the cars and means that must be used to accomplish that which the plaintiff was required to do. This is true also as to whether the plaintiff had ample time to get aboard after the order was given and before the engine moved against the cars. We fail to discover any question in the record except whether the verdict is against the evidence, and think there is evidence upon which the verdict can be well based.

AFFIRMED.

ALLEN V. HULL.

PRACTICE IN THE SUPREME COURT: ABSTRACT.

Appeal from Fremont District Court.

TUESDAY, JUNE 21.

ACTION to foreclose a mortgage. There was a decree for the plaintiff. The defendant appeals.

W. G. Read, for appellants.

Wynn & Wynn, for appellee.

ADAMS, CH. J.—No question is raised in this case except upon the sufficiency of the evidence, and the abstract does not purport to contain all the evidence. We do not look beyond the abstract in such case, and it is manifest that if it does not affirmatively appear that we have all the evidence before us, we can do nothing but affirm.

The abstract contains what purports to be a stipulation, which is in these words: "It is hereby stipulated by the attorneys for the parties in the above entitled case that no transcript shall be required, but that the same shall be tried on the printed abstract of the parties." The effect of this stipulation was certainly to waive a transcript; but we think that it did not have the effect to waive the defect in the abstract. It must be held to mean merely that the case should be tried upon the abstract, subject to whatever objections could properly be raised upon the face of it.

There is in the abstract preceding the evidence a statement that the case

was tried "on the within evidence." If the statement had been that the case was tried on the within evidence, *and no other*, that would have been sufficient. As it is, all that we know is that the evidence set out was before the court below. As there might have been other evidence which essentially modified the force and effect of that set out, the judgment must be

AFFIRMED.

SIGLER v. SHIELDS.

SIGLER v. HIDY ET AL., ANTE, 504, FOLLOWED.

Appeal from Decatur Circuit Court.

TUESDAY, JUNE 21.

Stuart Bros., for appellant.

Nourse, Kauffman & Jackson, and *Wilson Bros. & Mitchell*, for appellee.

BECK, J.—This cause is precisely like the foregoing case of *Sigler v. Hidy*, ante, 504. The abstracts and the arguments of counsel in the two cases are substantially the same, and the questions of law and fact are identical in each. Following the decision in *Sigler v. Hidy*, the judgment of the Circuit Court is

REVERSED.

McCLURE v. BROWN.

ADMINISTRATOR: ACCOUNTING: INTEREST.

Appeal from Louisa Circuit Court.

WEDNESDAY, OCTOBER 5.

THE defendant is executor of the last will and testament of William M. McClure, deceased. Exceptions were taken to his report in the court below, and upon a trial it was found that the defendant was properly chargeable with interest at six per cent per annum on an item of \$900, from November 6, 1879. The plaintiff insisted that interest should be computed on said sum from September 17, 1878, and because the interest was not thus computed, he appeals.

Hammack, Howard & Virgin, for appellant.

Hurleg & Hale, J. C. Power and *Newman & Blake*, for appellee.

ROTHROCK, J.—The record of the case contains certain findings of fact made by the Circuit Court. There is also a bill of exceptions, but the evidence upon which the court below made the order requiring interest to be paid from November 6, 1879, is not before us. Appellant claims that interest should be charged from September 17, 1873, and insists that the defendant "misappropriated" the sum of \$900. If it were shown that at the date claimed the defendant wrongfully appropriated the money of the estate to his own use, of course he would be liable for interest on such wrongful appropriation from the date thereof. But the defendant's counsel insist that the record does not show when the money was wrongfully appropriated.

A careful examination of the abstract leads us to the conclusion that such is the fact, or to say the least we do not think it affirmatively appears when the defendant actually appropriated the money. It is true the court finds that on or about September 17, 1873, defendant charged the estate with a legacy of \$900 claimed by himself, and which was not at that time, and is not yet, due. And it is further found that defendant "has said sum of \$900 now in his hands." What the state of defendant's account with the estate was when he made this charge does not appear. If he had the money then actually on hand, and appropriated it to his own use in payment of his legacy which was not due, he should account for interest. But unless this state of facts is made to appear affirmatively, the judgment of the court below cannot be disturbed. It is true the act of the defendant is designated in the bill of exceptions as a "misapplication" of the \$900, but in view of the findings of fact from which it appears that credit was taken by the defendant for the amount, we think it may fairly be said that the making of the charge against the estate was what was meant as a "misapplication."

Before we would be warranted in finding that the order as to interest was erroneous, we must be put in possession of the facts by an affirmative showing that the money for which a credit was taken was actually in the defendant's hands at the time claimed.

AFFIRMED.

PITTMAN V. PITTMAN ET AL.

PRACTICE IN THE SUPREME COURT: DEFECTIVE ABSTRACT.

Appeal from Lee District Court.

SATURDAY, OCTOBER 8.

Gillmore & Anderson, for appellant.

Casey & Hobbs and D. F. Miller & Sons, for appellee.

DAY, J.—The plaintiff alleges in substance that the defendant Truman Knowles, as the guardian of Willie and George Heule, minors, received

\$1,500 belonging to said minors, and loaned about \$1,000 thereof to his son-in-law G. W. Pittman on his personal security, and that G. W. Pittman failed in business and became insolvent; that afterward Knowles resigned his guardianship, and he and G. W. Pittman, for the purpose of making the plaintiff responsible for the loss of the estate of the minors, conspired together to procure the appointment of G. W. Pittman as guardian, and have the plaintiff become his surety on his guardian's bond; that G. W. Pittman was appointed guardian, and plaintiff became his surety; that G. W. Pittman executed his receipt to Knowles for the entire sum which came into his possession as guardian, and Knowles was discharged; that in fact only the sum of \$500 was turned over to G. W. Pittman upon his appointment as guardian, the balance having been previously loaned to him and consumed. The plaintiff prays that G. W. Pittman's guardianship may be revoked, that plaintiff be released from the operation of said bond, and that Knowles be placed where he stood before his resignation, and be made liable for the full amount of money he loaned to G. W. Pittman.

The abstract contains simply the pleadings and the evidence. It does not show what decree the court entered, nor in favor of which party it was rendered. It does not show the service of any notice of appeal, and does not even state that any appeal has been taken. An argument has been filed in which Knowles is designated as appellant, from which we may infer that the decree rendered is regarded by him as in some manner adverse to his interests. It is apparent, however, that we cannot undertake to reverse a decree without knowing what it is. If the decree were set out in the abstract, it might appear to be wholly unobjectionable. In the state of the record no course is left for us but to order that the judgment be

AFFIRMED.

ABBOTT & KNISELY v. DUTTON.

McHose v. Dutton, 50 Iowa, 728, FOLLOWED.

Appeal from Story District Court.

THURSDAY, OCTOBER 20.

THE plaintiffs claim that they furnished materials which were used in the erection of a court-house at Nevada, Story county, to the amount in value of more than \$300. That one Randall, who was contractor for the erection of said building, executed to the defendant, Dutton, a certain instrument in writing, by which he assigned to him all his interest in the court-house fund, and authorized him to receive the same from the county; that at the time of said assignment the said defendant orally agreed with and promised Randall that he would pay the claim of the plaintiffs from the money so received; the said instrument in writing having been executed to secure the payment of the claim of these plaintiffs, and the laborers and other material men. There was a denial by defendant of all liability, and of any contract

binding him to pay the claim of the plaintiff. A jury was waived and there was a trial by the court, which resulted in a judgment for defendant for costs. Plaintiffs appeal.

J. S. Frazier, for appellant.

C. H. Balliett and Henderson & Carney, for appellee.

ROTHROCK, J.--I. In the case of *McHose v. Dutton*, 55 Iowa, 728, the plaintiff, having furnished materials for the erection of the same building, sought to recover of the defendant upon the identical written instrument or assignment which is relied upon in this action. The assignment is fully set out in that case and a mere reference to it is sufficient for the purposes of this appeal. In that action we held that no suit could be maintained by a material man against the defendant, based upon the written assignment.

In the case at bar the plaintiffs rely upon an agreement or promise made by the defendant to Randall, that he would pay the plaintiffs. It is also claimed that the same promise was made by the defendant to the plaintiffs.

It is sufficient to say of these allegations of fact that they are squarely denied by the defendant, and the evidence as to their correctness is strongly conflicting. Under such circumstances we cannot disturb the judgment.

II. The plaintiffs have presented a motion to tax the costs of appellee's abstract to him because the matters therein contained are irrelevant and immaterial. We have examined the abstracts together and have to say that while we think some of the amendments might have been omitted, yet there is no such a variance from the rules as to demand the imposition of costs upon appellee.

AFFIRMED.

HUTTON V. GALLIXSON.

PRACTICE IN THE SUPREME COURT: ASSIGNMENT OF ERRORS.

Appeal from Kossuth District Court.

FRIDAY, OCTOBER 21.

ACTION in replevin. Trial by jury, verdict for defendant. Plaintiff appeals.

Albert E. Clarke and M. H. Bliss, for appellant.

George E. Clarke, for appellee.

ADAMS, CH. J. The appellant has made no assignment of errors, and the appellees insist that there is nothing before us for review. Their position is well taken. We may say further that a majority of the court are inclined to think that an affirmance would probably be reached upon the merits.

AFFIRMED.

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ACTION.

1. **TIME OF COMMENCEMENT: SERVICE OF NOTICE.** It is only for the purpose of the statute of limitations that the delivery of an original notice to the sheriff for service constitutes the commencement of an action; for all other purposes the commencement of the action dates from the actual service of the notice. *Proska v. McCormick*, 318.

ADMINISTRATOR.

1. **PETITION TO SELL REAL ESTATE: TIME OF FILING.** The fact that the petition of an administrator for authority to sell real estate for the payment of debts is not filed until some months after the expiration of the year for the filing of claims against the estate is sufficiently excused by a showing that the property could not have been sold sooner without great sacrifice. *Conger v. Cook et al.*, 117.
2. ———. Where the petition of an administrator for leave to sell real estate shows that there are unpaid claims established against the estate which the personal property is insufficient to pay, it is not subject to demurrer because it fails to show that all payments theretofore made by the administrator were proper and legal, that being a question alone between the heirs and the administrator and his bondsmen, which cannot be allowed to prejudice the right of creditors of the estate to speedy payment. *Id.*
3. **ORDER OF DISCHARGE: WHEN CONCLUSIVE.** Where a final order discharging administrators is based upon the receipts of distributees for the amounts found due them, respectively, on final accounting, and no application to set aside such order is made within three months, it becomes conclusive as to the distributees, although they are plaintiffs in an action pending at the time of settlement against the administrators and their bondsmen. *Diehl v. Miller et al.*, 313.
4. **DUTIES OF: LIFE INSURANCE.** An administrator is charged with the duty of collecting life insurance payable to the "legal representatives" of his decedent upon his death, and he and his sureties are liable for a failure to inventory and distribute the avails of such insurance paid to him. *Kelley v. Mann*, 625.
5. ——— : ———. An administrator *de bonis non*, appointed after the death of the widow of his decedent, who was his administratrix, cannot maintain an action to recover from her sureties the avails of a policy of insurance on the life of his decedent collected by her, and not accounted for, such sureties being accountable only to the children of the decedent, or their guardians, for the amount of their shares thereof. *Id.*

ADOPTION.

1. **REQUISITES OF: RIGHT OF INHERITANCE.** Rights of inheritance can only be acquired through adoption by a full compliance with the provisions of the statute; where articles of adoption are properly executed, but are not recorded during the lifetime of the person adopting, no right to inherit from him is thereby conferred on the child, though the latter has complied with the terms of such articles during the full period of his minority. *Shearer et al. v. Weaver et al.*, 578.

AD QUOD DAMNUM.

1. **RIGHTS OF MORTGAGEE: WHEN NOT MADE A PARTY.** A mortgagee, who is not made a party to proceedings for the condemnation of right of way for a railroad over the mortgaged property, may waive the omission and assert his claim to the award in the hands of the sheriff, and such claim, where it is shown that the property is insufficient to pay the mortgage debt, and that the mortgagor is insolvent, constitutes a lien thereon superior to that of a prior attachment levied by a creditor of the mortgagor. *Sawyer v. Landers & Son*, 422.

AGENCY.

1. **PROOF OF COURSE OF DEALING.** Evidence considered and held insufficient to establish such a course of dealing as would justify a third person in presuming that an employe had authority to sell property of his employers and receive payment for the same. *Holbrook & Bro. v. Oberne, McDaniel & Co. et al.*, 324.

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USURY, 1.

APPEAL.

1. **AMOUNT IN CONTROVERSY.** Where a tender made by the defendant reduces the amount in actual controversy in an action to less than one hundred dollars, no appeal will lie except upon a question of law certified by the trial judge. *Marlow v. Marlow*, 299.
2. **FILING OF TRANSCRIPT: PRACTICE IN THE SUPREME COURT.** An appeal must be taken within six months after the rendition of the judgment or order appealed from, but it is not required that it shall be perfected by the filing of a transcript in the Supreme Court within that time. *Fairburn v. Goldsmith et al.*, 347.
3. ———: ———. Where good faith is shown by the appellant his appeal will not be dismissed for a failure to file a transcript until after he has had timely notice that one will be required by the appellee. *Id.*
4. **AMOUNT IN CONTROVERSY: HOW DETERMINED.** Where no counterclaim is filed, the amount in controversy in an action is to be determined from the allegations of the petition, rather than from the amount claimed in the prayer. *Cooper v. Dillon et al.*, 367.

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1. MISCONDUCT OF. While an arbitrator is protected from civil liability for his acts, the fact that his willful misconduct rendered the award invalid and unavailing to the parties may be shown by them to defeat a recovery in an action to recover for his services as such arbitrator. *Bever v. Broien et al.*, 563.

ATTACHMENT.

1. GROUNDS FOR: FACTS CONSIDERED. Facts considered and held insufficient to authorize an attachment. *Allerton v. Eldridge*, 709.
2. RELEASE OF: BOND. A bond given by an attachment defendant in whose custody the attached property is left, conditioned that he will return the same on demand to the sheriff, does not constitute a statutory delivery bond which will discharge the attachment. *Id.*

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1. PRESUMPTION OF AUTHORITY: EVIDENCE TO OVERCOME. The presumption that an attorney who brings an action is authorized to do so by the plaintiff can only be overcome by clear and satisfactory evidence. *Wheeler v. Cox et al.*, 36.

See ATTORNEY'S LIEN.

ATTORNEY'S LIEN.

1. NOTICE OF: SUFFICIENCY. A notice of a claim for an attorney's lien, inserted by the plaintiff's attorneys in the original notice served upon the defendant in an action, is sufficient if properly signed. *Smith & Baylies v. The C., R. I. & P. R. Co.*, 720.
2. — : SERVICE ON CORPORATION. The service of a claim for an attorney's lien upon the agent of a corporation upon whom the original notice in the same action is served, and at the same time, is a sufficient service to bind the corporation. *Id.*
3. WHEN GIVEN: ACTIONS OF TORT. The right to a lien on money due his client in the hands of the adverse party, given an attorney by subdivision 3 of Sec. 215 of the Code, is not confined to actions on contract, but exists in all actions where there is a money liability from the adverse party to his client. *Id.*
4. NOTICE. A single notice that a lien is claimed is sufficient to cover all services rendered in the action by the claimant, whether before or after the service of the notice. *Id.*

BOND.

1. FOR DELIVERY OF ATTACHED PROPERTY: WHO MAY ENFORCE. Under section 2787 of the Revision an attachment plaintiff or his assignee may maintain an action on a delivery bond. *Rowley v. Jewett*, 492.
2. INTERLINEATION IN. An interlineation in a delivery bond, giving a description of the attached property, made in good faith by the officer to whom the bond is presented for acceptance, at the request of the princi-

pal in the bond, is not a material alteration and will not release a surety from liability thereon. *Id.*

3. —: SURETY. A surety in a bond, who releases property held by him as indemnity upon the statement of the obligee that he has received payment of the amount secured by the bond, is released from liability thereon only to the extent of the value of the property released, which it is incumbent on him to establish. BECK, J., *dissenting*. *Id.*

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- Barton v. Thompson, 46, 30. Evidence. *Welch v. Jugenheimer*, 11.
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CIRCUIT COURT.

1. AS A COURT OF PROBATE: EQUITY POWERS. The Circuit Court as a court of probate is invested by the Statute with no general chancery powers. *Perry et al. v. Drury et al.*, 60.

See JURISDICTION, 4.

PRACTICE, 15.

COMMON CARRIERS.

See RAILROADS, 6.

CONTRACT.

1. FOR SALE OF PATENT RIGHT: FRAUDULENT REPRESENTATIONS. The plaintiff conveyed lands to the defendant in consideration of the assignment to him of an interest in a certain patent which the defendant represented had been issued to him on an article of his invention, but which, in fact, had not at the time been issued, and when a patent was afterward granted on the invention it did not cover all the points claimed by the defendant: *Held*, that the plaintiff was entitled to a rescission of the contract. *Meyers v. Funk et al.*, 52.
2. COUNTY: WAIVER. Where a contract required a vote of the electors to render it binding on a county, it was held that its performance by the other party could not be waived, nor the county estopped from denying such performance by the action of its board of supervisors in making payments thereunder. *The B., C. E. & M. R. Co. v. The County of Benton*, 89.
3. FOR SALE OF LAND: EVIDENCE CONSIDERED. Evidence considered and held sufficient to establish a verbal contract between the defendant and one since deceased, in pursuance of which the latter transferred possession of certain land to the defendant, in consideration of his support during the remainder of his natural life. *Rink et al. v. Sample et al.*, 100.
4. BREACH OF: PRACTICE. In an action to recover the consideration paid for certain lands which the defendant contracted to have patented to the plaintiff by a specified date, but which were not so patented, the defendant alleged that he had assigned to the plaintiff a certificate which in fact conveyed the title to the lands and right to a patent: *Held*, that the issue presented by such allegation should have been submitted to the jury, and if the facts were found to be as alleged that the plaintiff could not recover without returning or offering to return such certificate. *Yokom v. McBride*, 139.
5. —: MEASURE OF DAMAGES. The measure of damages for the breach of a contract to convey land, where it occurs without the fault of the vendor, is the consideration paid him for the land, with interest, but if the failure occurs through his fault the vendee may recover such consideration, or the value of the land at the time the conveyance should have been made, if greater than the consideration paid. *Id.*
6. VALIDITY OF: MENTAL UNSOUNDNESS OF PARTY. Persons of unsound mind will be bound by their executed contracts where such contracts are fair and reasonable, and were entered into by the other parties without knowledge of the mental unsoundness, in the ordinary course of business, and where the parties cannot be placed in *statu quo*. *Abbott v. Creal et al.*, 175.

7. **BREACH OF:** Where a contract for the sale of stock of agricultural machinery provided for part payment from the proceeds of sales thereof by the purchaser, it was held that the removal of the machinery by him out of the State did not constitute a breach of the contract which would convert the claim of the seller into a money demand against him, the contract containing no covenant against removal. *Goodale v. Hoy*, 242.
8. **FOR PUBLICATION OF BOOK: COPYRIGHT.** Where by the terms of a contract for the publication of a book the author was to procure a copyright, for the benefit of the publishers, it was held that he could not maintain an action against them for a failure to publish the book in accordance with the contract without showing that he had deposited in the mail, addressed to the librarian of Congress, a printed copy of the title, such act being required by the copyright laws precedent to the publication of the book. *White v. Day, Egbert & Fidler*, 248.
9. **TO SETTLE MORTGAGE: CONSTRUCTION.** A contract whereby one party agrees to settle a certain mortgage given by the other creates a personal liability on the part of the former to pay the indebtedness secured by the mortgage. *Gilbert v. Sanderson*, 349.
10. ———: **CANCELLATION OF.** Such contract may be canceled by the parties thereto, upon a sufficient consideration, at any time before it becomes known to, and is accepted by, the mortgagee. *Id.*
11. **CONDITIONS: SPECIFIC PERFORMANCE.** Evidence considered and held to establish certain conditions upon which an agreement to convey right of way to a railroad company was signed, and that such conditions had not been complied with. *Hastings & Avoca R. Co. v. Miles et al*, 447.
12. **MADE BY OFFICER OF CORPORATION: PERSONAL LIABILITY ON.** A contract containing the words "we promise to pay," and signed by two persons describing themselves respectively as "president school board" and "secretary school board," but which contained no reference to any school district, was held to be the personal obligation of the signers, who could not show by parol evidence that such was not in fact the intention. *Wing v. Glick et al.*, 473.
13. **REFORMATION OF: EQUITABLE JURISDICTION.** An allegation of a mistake in a written contract, and a prayer for its correction, will not authorize the reformation of the contract in other particulars, nor impair its validity as to its other provisions. *Rump v. Schwartz et al.*, 611.
14. **FORFEITURE: WAIVER OF.** Where after default in making payments under a contract for the sale of land, whereby under its terms a forfeiture was worked, the vendor enforced payment of a portion of the sum by the sale of property mortgaged as security, it was held that he thereby waived the forfeiture, and could not insist thereon after a tender of the balance due under the contract. *Id.*
15. **FOR SALE OF LAND: WAIVER OF FORFEITURE.** A contract construed and held not to constitute a waiver of the right to declare a forfeiture of a prior contract for the sale of land, except as to previous defaults. *Cohrt v. Kock*, 653.
16. ———: **RESCISSION.** The fact that by a contract for the sale of land the vendee agrees to assume payment of a mortgage thereon will not prevent the vendor from rescinding the contract for proper cause, where it does not appear that the mortgagee has accepted the substitution made by the contract. *Id.*
17. ———: ———. Facts considered under which it was held that a vendee did not become entitled to a deed under his contract. *Id.*

18. **FOR SALE OF REAL ESTATE: CONSTRUCTION OF.** A written contract construed and held to constitute a sale of real estate subject to forfeiture, and not a mortgage, the relation of debtor and creditor not being created thereby between the parties. *Stroup v. Haycock et al.*, 729.

See EVIDENCE, 5.

FRAUDULENT REPRESENTATIONS, 1.

MECHANIC'S LIEN, 1.

PRACTICE, 35.

PRINCIPAL AND AGENT, 5, 6.

PROMISSORY NOTE, 10.

RAILROADS, 3.

SCHOOLS, 3.

VENDOR AND VENDEE, 1.

CONVEYANCE.

1. **WHEN VOID: HUSBAND AND WIFE.** Evidence considered under which it was held that a conveyance of land by a husband to his wife was voluntary and void as against existing creditors of the husband. *Moore v. Orman et al.*, 39.
2. **DELIVERY OF DEED: WHAT IS SUFFICIENT.** A deed to property delivered to the husband of the grantee, with the intention on the part of the grantor that such delivery should pass the title, was held to divest him of the title and vest it in the grantee, although it was made without her knowledge and was not delivered to her by her husband, but came into her possession some months afterward. *Parker v. Parker*, 111.
3. **QUITCLAIM DEED: EFFECT OF.** The grantor by a quitclaim deed takes the property described therein subject to equities existing in favor of others, and this rule is not changed by the fact that such deed contains the words "bargain and sell." *Wightman v. Spofford et al.*, 145.
4. **WHEN CONDITIONAL: CONSTRUCTION.** An instrument executed by a husband and wife, which by its terms is to operate as a conveyance of the lands therein described, upon the performance by the parties of the second part of certain covenants therein contained, otherwise to be void, constitutes an executory contract, which does not operate as a present conveyance, and cannot be enforced by the parties of the second part after default. *In the Matter of the Application of Elizabeth Smith*, 270.
5. —: **CONDITIONS PRECEDENT.** If such instrument be regarded as a deed, the covenants contained therein to be performed by the grantees would constitute conditions precedent, and the title to the lands would not pass until their performance. *Id.*
6. **VALIDITY OF: ESTOPPEL.** Where the owner of land agreed with the holder of a judgment against him that the latter should purchase a maturing tax sale certificate on the land, and take and hold the title under the same as security for the payment of his judgment, and in accordance with a further agreement between them the holder afterward sold and conveyed the property under the tax title, to one who had no knowledge that he held such title as security only, it was held that the former owner was estopped to claim that the title acquired by such grantee was not absolute. *Jordan et al. v. Brown et al.*, 281.

7. **FRAUD.** Evidence considered and held insufficient to establish fraud in a conveyance of real estate by a husband to his wife. *Addicken et al. v. Humphal et al.*, 365.
8. **VALIDITY OF: TRUSTEES.** Where trustees holding the title to lands for the benefit of a railroad company conveyed certain of the same for their own personal benefit, in payment for their services as such trustees, under authority from the board of directors of the railroad company, it was held that the validity of such conveyance could not be attacked by one claiming the land through a title adverse to that by which it was held by the railroad company. *Miller et al. v. The Iowa Land Company et al.*, 374.

See WILL, 2.

CORPORATION.

1. **DEFECTIVE ORGANIZATION: LIABILITY OF STOCKHOLDERS.** An attempted incorporation of a savings bank under the laws of Kansas held so defective as not to secure to the stockholders exemption from personal liability for debts of the bank. *Kaiser v. Lawrence Savings Bank et al.*, 104.
2. ———: ———. Where a stockholder claims exemption under the provisions of a general incorporation law, he must show that the association of which he is a member has sufficiently complied with the requirements of the law to become legally incorporated; an attempt to become incorporated, and the doing of business under a claim of incorporation, are not sufficient to create such exemption. *Id.*
3. **DIRECTOR: WHEN ALSO A CREDITOR.** A director of a corporation may become its creditor, and take and enforce a mortgage on its property, but he is not thereby divested of his responsibility as a director, nor the duties which as such he owes to the corporation, and he is bound to act in the utmost good faith throughout the transaction. *Hallam v. The Indianola Hotel Co. et al.*, 178.
4. ———: ———. Facts considered upon which it was held that a sale of property of a corporation, under a mortgage held by one of its directors, should be set aside. *Id.*

See ATTORNEY'S LIEN, 2.

COSTS.

1. **ON APPEAL IN CRIMINAL CASE: LIABILITY OF COUNTY FOR.** A county is not liable for the cost of printing the abstract and argument of a defendant convicted of crime, on his appeal to the Supreme Court, though the judgment against him is reversed on such appeal; section 3790 of the Code has reference only to sheriff's fees. *Red v. Polk County*, 98.

See PRACTICE, 9, 16.

COUNTY.

1. **LIABILITY FOR JAIL SUPPLIES: SHERIFF.** A sheriff may procure the articles he is required by the statute to furnish for the use of prisoners in his custody on the credit of the county, and the person furnishing the same may maintain an action directly against the county for the purchase price. *Feldenheimer v. The County of Woodbury*, 379.
2. ———: ———. One so furnishing supplies for prisoners is bound to

know that the articles supplied are suitable for the purpose, and possibly that they are necessary, but is not required to determine beyond that whether or not the sheriff has properly exercised the discretion vested in him by the statute. *Id.*

See CONTRACT, 2.

COSTS, 1.

TAXES, 1.

COUNTY AUDITOR.

See MORTGAGE, 1.

COURT.

1. ADJOURNMENT BY TELEGRAPH: LEGALITY OF. A telegram from the judge to the clerk, ordering an adjournment of court, is a written order within the meaning of the statute, and adjournment made in pursuance thereof is legal. *The State v. Holmes*, 588.

CRIMINAL LAW.

1. INDICTMENT: CONSTRUCTION OF. An indictment for rape construed and held to sufficiently charge the crime. *The State v. Pennell*, 29.
2. FALSE PRETENSES: INDICTMENT. An indictment for obtaining money under false pretenses considered and held sufficient. *The State v. Montgomery*, 195.
3. ———: EVIDENCE. Evidence of matters preceding the obtaining of money by false pretenses considered and held admissible as relating to a part of the transaction. *Id.*
4. ———: WHAT CONSTITUTE. While a false promise to repay will not alone sustain an indictment for obtaining money under false pretenses, it may, when coupled with a false representation as to property owned by the person making it. *Id.*
5. ———: ———. The fact that a false representation made by a defendant was not such as would deceive a shrewd and experienced man will not constitute a defense, when the person intended to be deceived thereby was in fact deceived. *Id.*
6. FALSE PRETENSES: EVIDENCE. *The State v. Montgomery*, ante, 195, followed. Error in the admission of immaterial evidence held to be cured by its prompt exclusion from the jury. *The State v. Davis*, 202.
7. LARCENY: FORMER CONVICTION. A conviction for petit larceny before a justice of the peace is a bar to a subsequent prosecution on indictment for larceny from the person, based on the same act. *The State v. Gleason*, 203.
8. INDICTMENT FOR RAPE: INCLUDED CRIMES. An indictment for rape includes the crime of assault with intent to commit rape, and that of simple assault, and an instruction which precludes the jury from convicting of the latter crime under such an indictment is erroneous. *The State v. Peters*, 263.
9. PROSTITUTION: WHAT CONSTITUTES. Whether or not a woman is a prostitute is a question of fact, which does not alone depend on the num-

- ber of persons with whom she has had illicit intercourse, but in determining which a jury may consider her general conduct and other circumstances tending to show whether or not she so holds herself out to the public. *The State v. Rice*, 431.
10. PROSECUTION FOR LIBEL: INSTRUCTION. In prosecution for libel in which the defendant is convicted, an erroneous instruction given the jury cannot be held to be without prejudice, although the jury were told that the instructions are advisory merely, and not binding upon them. *Id.*
 11. GREAT BODILY INJURY: DEFINITION OF. A great bodily injury is an injury to the person of a more grave and serious character than a battery, but what precisely constitutes such an injury cannot be stated in an instruction, but is a question for the jury in each case. *The State v. Gillett*, 459.
 12. INDICTMENT: CHARGING TWO OFFENSES. The crimes of forgery and of uttering forged paper are distinct and separate offenses and cannot both be charged in one indictment, *The State v. Nichols*, 88 Iowa, 110, overruled. *The State v. McCormack*, 585.
 13. PROOF OF FORMER CONVICTION: LIKE OFFENSE. Upon the trial of an indictment for keeping a house of ill fame, found under section 4013 of the Code, proof of a prior conviction of the defendant on an indictment based on section 4091, but which did not charge the keeping of a house of ill fame, was held inadmissible to establish a former conviction for a like offense for the purpose of increasing the penalty under the statute. *The State v. Holmes*, 588.
 14. INDICTMENT: ROBBERY. A charge in an indictment for robbery that the defendant did, with force, etc., steal, take, and carry away from another certain property, is not equivalent to charging that it was taken from his person, and is insufficient. *The State v. Leighton*, 595.

CROPS.

1. WHEN NOT A PART OF REALTY: FORECLOSURE OF MORTGAGE. As between the purchaser of land at a foreclosure sale and a tenant of the mortgagor, the latter is entitled to crops grown by him which are matured at the time the sheriff's deed is executed, though not yet severed from the land. *Hecht v. Dettman*, 679.

DAMAGES.

1. WHEN EXEMPLARY ARE RECOVERABLE: PLEADING. In an action to recover for the wrongful dispossession of the plaintiff of a dwelling house exemplary damages can only be recovered where malice is alleged and proved; such allegation must be made in the petition, and is insufficient in a reply. *Jones v. Marshall*, 739.

See CONTRACT, 5.

INTOXICATING LIQUORS, 1, 2.

RAILROADS, 10, 11, 19, 20.

TORT, 1, 2, 3.

DEED.

1. DATE OF EXECUTION: EVIDENCE TO IMPEACH. A very strong presumption exists in favor of the correctness of a deed as to the date of its exe-

cution recited therein, and shown by the certificate of the notary taking the acknowledgment. Evidence held insufficient to overcome such presumption. *Bird v. Adams et al.*, 292.

2. AS EVIDENCE: RECITAL OF CONSIDERATION. The recital in a warranty deed of the consideration therefor is not evidence to show that the grantee is a purchaser for value, as against one claiming adversely to his title. *Hogdon v. Green*, 735.

DESCENT.

1. PERSONAL PROPERTY EXEMPT FROM EXECUTION. Where a husband dies leaving personal property which was exempt from execution in his hands, and such property is taken possession of by his widow, she will not be deprived of her right thereto under the statute by the fact that no inventory and appraisement were made as provided for by section 2371 of the Code. *Addinson v. Breeding*, 26.

DIVORCE.

1. CUSTODY OF CHILD: RES ADJUDICATA. Where the decree in an action for divorce awards the custody of a child to one parent it cannot be transferred to the other in a collateral action, but only by a change in the decree, obtained by direct proceedings for that purpose.

See PARENT AND CHILD, 1.

DOWER.

1. LAW GOVERNING ASSIGNMENT OF. The assignment of dower to a widow is governed by the law in force at the time of the death of the husband. Following *Lucas v. Sawyer*, 17 Iowa, 517. *Cunningham v. Wilde et al.*, 369.
2. WHEN INCONSISTENT WITH DEVISE. Where a will directed that the income from certain described real estate, left in trust to the widow of the testator, should be used for the benefit of certain minor children, between whom, on attaining their majority, the land was to be divided, it was held that the widow, while claiming under the provisions of the will, was not entitled to a distributive share in such land. *Van Guilder v. Justice et al.*, 669.

See WILL, 3, 4.

DRAFT.

1. PAROL EVIDENCE TO VARY TERMS OF. Parol evidence is not admissible to show that a draft payable by its terms in money is in fact, by the understanding of the parties, payable in something else. *Kimball & Mitchell v. Bryan*, 632.
2. LIABILITY OF DRAWER: PRESENTMENT AND NOTICE. The drawer of a draft which he had no reasonable ground to believe would be honored is liable thereon without proof of presentment and notice of non-payment. *Id.*

ELECTION.

1. CONSTRUCTION OF BALLOT: RULES GOVERNING. The language of a ballot is to be construed in the light of all the facts surrounding the elec-

tion, and if it expresses the intention of the voter beyond reasonable doubt it is sufficient, though technically inaccurate. *Hawes et al. v. Miller et al.*, 394.

2. REMOVAL OF COUNTY SEAT: BRIBERY. Contributions for the erection of county buildings, offered to secure the removal of a county seat, do not constitute bribes which will invalidate an election held to vote on such removal. *Id.*

EQUITABLE ASSIGNMENT.

1. GARNISHMENT. The holders of certain notes and accounts which had been assigned them to be collected, and the proceeds applied on certain specified indebtedness of the assignor, were held not to be subject to garnishment by other creditors of the assignor. *Van Winkle v. The Iowa Iron & Steel Fence Co. et al.*, 245.

EQUITABLE JURISDICTION.

1. INJUNCTION: REMEDY AT LAW. A court of equity which has acquired jurisdiction of an action for the purpose of canceling a contract may retain the case and do complete justice between the parties by injunction, though a part of the relief granted might have been obtained in an action at law. *McMurray et al. v. Van Gilder*, 605.
2. ACTION TO SET ASIDE JUDGMENT: PRACTICE. An action in equity to set aside and cancel a judgment against the plaintiff as void for want of jurisdiction cannot be maintained where the petition shows that the claim upon which the judgment was rendered was just in part, and no offer to pay such part is made. *Byers v. Odell*, 618.
3. REFORMATION OF WILL. A court of equity has no power to reform a will devising real estate. *Chambers et al. v. Watson*.
4. INJUNCTION: FORECLOSURE OF CHATTEL MORTGAGE. The right to an injunction restraining the foreclosure of a chattel mortgage, and to a removal of the proceedings therefor into the Circuit or District Court, given by section 3317 of the Code, is not an absolute one, and does not exist where the applicant has a full and complete remedy in a pending action at law. *Sweet, Dempster & Co. v. Oliver et al.*, 744.

See CIRCUIT COURT, 1.

CONTRACT, 13.

JUDICIAL SALE, 1.

ESTATE.

1. LIABILITY ON PROMISSORY NOTE. Evidence considered and held insufficient to establish the liability of an estate upon certain promissory notes. *Turner v. Potter*, 251.
2. ALLOWANCE OF CLAIM: ADJUDICATION. The fact that a claim filed against an estate is allowed by the administrator in a sum smaller than that claimed, and such allowance is entered by the clerk and approved by the court, will not constitute an adjudication which will prevent the claimant from demanding a trial as to the portion of the claim not allowed. *Smith v. McFadden*, 482.
3. ———: WHEN BARRED. A claim of the third class against an estate is not barred because not proved up until after the expiration of twelve months from notice of the appointment of an administrator. *Id.*

4. ———: ———: A delay to bring a claim on for hearing will not operate as an estoppel to prevent its being proved unless the estate has been prejudiced by the delay. *Id.*

See PRACTICE, 18, 19.

STATUTE OF LIMITATIONS, 2, 8.

TAXATION, 4, 5, 6.

ESTOPPEL.

1. MUNICIPAL CORPORATION: EVIDENCE CONSIDERED. Evidence considered and held sufficient to establish facts which estopped the defendant city from claiming title to certain real estate as against the plaintiffs. *Simplot v. The City of Dubuque*, 699.

See CONVEYANCE, 6.

EVIDENCE.

1. DAMAGES: SALE OF INTOXICATING LIQUORS. In an action by a wife to recover damages for injuries caused by the sale of intoxicating liquors to her husband, evidence to show that the husband when intoxicated used abusive language toward his family is inadmissible, it not being shown that the plaintiff's health was affected thereby. Following *Calloway v. Laydon*, 47 Iowa, 466. *Welch v. Jugenheimer*, 11.
2. ———: ———. Evidence showing the number and ages of the plaintiff's children is also inadmissible to affect the amount of damages in such an action. *Id.*
3. ———: ———. The admission of immaterial and incompetent evidence held prejudicial error. *Id.*
4. OF CRIMINAL ACT: DEGREE OF PROOF REQUIRED. In a civil action to recover damages for an act which is also indictable as a crime, such fact does not render necessary a higher degree of proof, a preponderance of evidence, only, being necessary to establish the cause of action. *Barton v. Thompson*, 46 Iowa, 30, *overruled*. Whether the same rule would be applicable to cases of slander and libel, where a crime is charged and justification pleaded, *quære*. *Id.*
5. CONVERSATION THROUGH INTERPRETER: CONTRACT. The testimony of a witness to a conversation between himself and another through an interpreter, by which a contract was made, is competent evidence to establish the contract. *McCormicks v. Fuller & Williams et al.*, 43.
6. DECLARATIONS: VENDOR AND VENDEE. The declarations of a vendor in possession of property to which he has parted with his right are not admissible in evidence to affect the rights of his vendee, against whom no charge of fraud is made. *Id.*
7. TIME OF INTRODUCTION: PRACTICE. A court may, in its discretion, allow the introduction of evidence after the arguments of counsel have been concluded. *Darland v. Rosencrans*, 122.
8. TO ESTABLISH FRAUD: DEGREE OF PROOF. A preponderance of evidence, only, is required in a civil action to establish the making of fraudulent representations. Following *Welch v. Jugenheimer*, p. 11, *ante*. *Wood v. Porter*, 161.
9. DEGREES OF PROOF: CRIMINAL ACT. In a civil action only a prepon-

derance of evidence is required to establish a fact, though it is the doing of an act which constitutes a crime. Following *Welch v. Jugenheimer*, ante, 11. *Lewis v. Garretson*, 278.

10. **OBJECTION TO DEPOSITION: PRACTICE.** A deposition which has been read without objection upon one trial of an action cannot be objected to on a second trial on the ground of the incompetency of the witness. *McMillan v. The B. & M. R. R. Co.*, 421.
11. **VALUE OF PROPERTY SOLD ON EXECUTION: APPRAISEMENT.** The appraisement of property sold under execution is not competent evidence to prove its value, in an action by one claiming to be the owner of the property to recover its value. *Flannigan v. Althouse, Wheeler & Co. et al.*, 513.
12. **OFFICER'S RETURN ON EXECUTION.** The return of an officer on an execution constitutes the best evidence of what property was levied on thereunder. *Id.*
13. **PROCEEDING IN BASTARDY: DEGREE OF PROOF.** In a proceeding in bastardy, under section 4720 of the Code, a defendant may be found guilty upon the unsupported evidence of the prosecutrix. *The State v. McGlothlen*, 544.
14. ———: ———. Such an action is triable by ordinary proceedings, and a preponderance of evidence only is necessary to a conviction. *Id.*
15. **PROOF OF GOOD CHARACTER: WHEN ADMISSIBLE IN CIVIL ACTION.** In a civil action evidence of the good character of the defendant is only admissible where intention is the point in issue, and the proof consists of slight circumstances. *Barton v. Thompson*, 571.

See CRIMINAL LAW, 3, 6.

DEED, 2.

DRAFT, 1.

PRACTICE, 7.

PROMISSORY NOTE, 4.

RAILROADS, 4, 7, 8, 9, 14, 15, 18.

TAX SALE AND DEED, 5, 6, 7, 10, 13.

VENUE, 1.

EXEMPTION.

1. **PROCEEDS OF EXEMPT PROPERTY.** The proceeds of personal property exempt from execution, voluntarily sold by the owner, are not exempt. *Harrier v. Fassett et al.*, 264.
2. **HEAD OF FAMILY: HUSBAND AND WIFE.** Where a husband and wife, having no children, lived separate and apart for the period of seven years prior to the husband's death, he boarding with others and neither contributing nor being asked to contribute to his wife's support, it was held that he was not at the time of his death the head of a family, within the meaning of the statute exempting personal property from execution. *Linton v. Crosby*, 386.

See TAXATION, 1.

FRAUD.

See CONVEYANCE, 7.

INSTRUCTIONS, 3.

PLEADING, 3.

SALE, 1, 2, 3.

FRAUDULENT CONVEYANCE.

1. WHAT IS NOT: PAYMENT OF DEBT. A conveyance of land by a debtor to a creditor in payment of his debt, although made in acceptance of a voluntary proposition by the creditor that he would convey the land to the debtor's wife, who was his daughter, as a gift or advancement, was held not to be fraudulent as to other creditors of the grantor. *Smith v. Riggs et al.*, 488.

FRAUDULENT REPRESENTATIONS.

1. CONTRACT MADE ON SUNDAY. An action will not lie to recover damages for fraudulent representations made as inducement to a contract entered into on Sunday. *Gunderson v. Richardson*, 56.
2. EVIDENCE CONSIDERED. Evidence held insufficient to establish fraudulent representations in relation to real estate sold by the defendant to the plaintiff. *Porter v. McElhiney*, 98.

See EVIDENCE, 8.

GARNISHMENT.

1. PRACTICE: SETTING ASIDE DEFAULT. The setting aside of a default against a garnishee held proper, under the showing made. *Hueskamp Bros. v. Van Leuwen et al.*, 653.
2. LIABILITY OF GARNISHEE. A garnishee cannot be held liable because of an indebtedness on a written lease, payable to another than the defendant, though it is shown that the leased property is in fact owned by the defendant. *Id.*

See EQUITABLE ASSIGNMENT, 1.

PRACTICE, 5.

GUARANTY,

1. WHEN A CONTINUING OBLIGATION: NOTICE. The guarantors of a contract which may be terminated at the pleasure of either party, and on which their liability is a continuing one and liable to be increased and diminished at different times, have a right to notice of the amount thereof within a reasonable time after the termination of the contract. *The Singer Manufacturing Company v. Little et al.*, 601.
2. WHO ARE GUARANTORS. The sureties on the bond of an agent for the sale of sewing machines, conditioned that such agent will account for all money and property coming into his hands, are guarantors within the meaning of the above rule. *Id.*

HUSBAND AND WIFE.

See CONVEYANCE, 1, 2.

EXEMPTION, 2.

INJUNCTION.

See EQUITABLE JURISDICTION, 1, 4.

INSTRUCTION.

1. **FAILURE TO ASK: PRACTICE IN THE SUPREME COURT.** Where an instruction given contains affirmative error it will not be sustained by the Supreme Court merely because the appellant failed to ask an instruction expressing the correct rule.
2. **APPLICABILITY TO EVIDENCE.** An instruction held erroneous, as not warranted by the evidence. *Templin v. Rothweiler et al.*, 259.
3. **MORTGAGE: FRAUD.** An instruction relating to the fraudulent transfer and mortgage of personalty considered and held erroneous under the evidence. *Flannigan v. Althouse, Wheeler & Co. et al.*, 513.

See CRIMINAL LAW, 10.

PRACTICE, 3.

INSURANCE.

1. **MISREPRESENTATION IN APPLICATION: INCUMBRANCES.** A statement in an application for insurance that the amount of incumbrance on the property was about three thousand dollars, when in fact it exceeded four thousand four hundred dollars, was held to constitute a material misrepresentation, which would defeat a recovery on the policy issued on such application, without regard to the good faith in which the statement was made. *Glade v. The Germania Fire Insurance Co. et al.*, 400.
2. **ACCIDENT POLICY: RECOVERY ON.** Under the provisions of a policy insuring the holder against accidents while traveling on the conveyances of any common carrier, provided he complied with the rules and regulations of such carrier and exercised due diligence for self protection, it was held that a passenger on a railway car, who was injured by being thrown from the steps of the car, where he stood while the train was approaching a station, in violation of a known rule of the company, was not entitled to recover. *Bon v. The Railway Passenger Assurance Co.*, 664.

INTERVENTION.

1. **GENERAL ASSIGNEE: ATTACHMENT.** An assignee for the benefit of creditors may intervene in an attachment suit brought against his assignor prior to the assignment, and set up a claim against the plaintiff therein for damages sustained by his assignor by reason of the wrongful suing out of the attachment, and this although the assignor has himself pleaded the same as a counter-claim. *Dunham, Buckley & Co. et al. v. Greenbaum, Schroder & Co. et al.*, 303.

INTOXICATING LIQUORS.

1. DAMAGES FOR SALE OF: WHEN RECOVERABLE. The sale of intoxicating liquors to a husband does not give the wife a right of action against the seller, under the statute, unless such liquor causes, or contributes to, the husband's intoxication. *Welch v. Jugenheimer*, 11.
2. ———: ———. Damages are recoverable for the giving of liquor to one who is at the time intoxicated, or in the habit of becoming intoxicated, the same as though the liquor was sold. *Id.*

See EVIDENCE, 1, 2.

JUDGMENT.

1. REVERSAL OF: RESTITUTION FOR PROPERTY SEIZED UNDER. Where property has been taken and sold under an execution issued upon a judgment which is afterward reversed by the Supreme Court, it is the duty of the party taking such property to make restitution therefor upon reversal of the judgment, and if not done the execution defendant may at once maintain an action, without demand, to recover the damages sustained by reason of such taking. *Zimmerman v. National Bank of Winterset*, 133.
2. COURT RECORDS: JUDGE'S CALENDAR. A judge's calendar is not a part of the court records, and an entry therein will not constitute a judgment. *Traer Bros. v. Whitman et al.*, 443.
3. WHAT CONSTITUTES: SIGNING OF RECORDS. A decree which is signed by the judge in vacation and entered of record by the clerk constitutes a valid judgment, although the record is not signed by the judge. *Id.*
4. COLLATERAL ATTACK. A decree, though erroneous in granting relief not prayed for, cannot be collaterally attacked where the court had jurisdiction. *Id.*
5. SUPERSEDEAS: REPLEVIN. Where property attached was released by a justice of the peace as exempt, on motion therefor, it was held that such decision was conclusive as to the defendants' right to the property until reversed, and that he might maintain replevin therefor if again seized by the plaintiff, although the latter had sued out a writ of error from the decision of the justice but had filed no supersedeas bond. *Pellersells v. Allen et al.*, 717.

See EQUITABLE JURISDICTION, 2.

PLEADING, 4.

PRACTICE, 19, 20.

JUDICIAL SALE.

1. EQUITABLE JURISDICTION: SALE WITHOUT REDEMPTION. While execution sales under judgments are subject to redemption, a court of chancery may in a proper case order an absolute sale of property without redemption. *Traer Bros. v. Whitman et al.*, 443.
2. REDEMPTION: JUDGMENT CREDITORS. The right of judgment creditors to redeem from an execution sale of property of their debtor becomes barred in nine months from the date of the sale, unless exercised by some creditor within that time. *George v. Hart*, 706.

JURISDICTION.

1. **WHEN CONFERRED BY CONSENT.** The rule that jurisdiction cannot be conferred by consent applies only where the court has not the right to assume general jurisdiction of the subject matter of an action; where the court has such general jurisdiction the parties may waive the ordinary process by which it is invoked. *Groves et al. v. Richmond et al.*, 69.
2. ———: **RULE APPLIED.** Where the District Court granted a writ of *certiorari* in a matter of which the Circuit Court has exclusive jurisdiction, it was held that an agreement by the attorneys of the parties that the action should be transferred to the Circuit Court, and should stand as though originally commenced there, conferred upon such court jurisdiction to proceed and determine the questions involved in the action. *Id.*
3. **ACTION AGAINST NON-RESIDENT DEFENDANT: ATTACHMENT.** Where in an action against a non-resident defendant, which was commenced by attachment served by garnishing a supposed debtor of the defendant, and the defendant was served by publication only, the answer of the garnishee showed that it was not indebted to the defendant at the time of the service of the attachment, it was held that the court acquired no jurisdiction to proceed in the action, though such answer disclosed an indebtedness to the defendant at the time it was made. *Morris v. The Union Pacific R. Co.*, 135.
4. **CIRCUIT JUDGE: CERTIORARI.** A circuit judge has jurisdiction upon the opening of a term of court to amend or expunge a record entry made by the clerk in vacation, and his action in so doing cannot be reviewed by the Supreme Court on a writ of *certiorari*. The parties to such an entry are deemed in court until a final disposition of it is made. *Carpenter v. Zuerer*, 390.

See JUSTICE OF THE PEACE, 1.

SHCOOLS, 1.

JUSTICE OF THE PEACE.

1. **JURISDICTION: IMPRISONMENT.** A justice of the peace has no authority to commit a person to prison for non-payment of a fine for contempt, where the judgment imposing the fine does not provide for imprisonment, and he is liable for damages in an action of tort to a person so illegally committed. *Langher v. Dewell et al.*, 153.
2. ———: **LANDLORD AND TENANT.** A justice of the peace has no jurisdiction to render a judgment of removal against a lessor to put his lessee in possession. *Krumoicide et al. v. Schroeder et al.*, 160.

LANDLORD AND TENANT.

1. **LIEN FOR RENT: WHEN IT ATTACHES.** Under the statute a landlord's lien for rent for the entire term of the lease attaches to property used on the leased premises at the time such property is brought thereon, although it may not be enforceable as to rent not due, so long as the business of the tenant is conducted in the usual manner, and as contemplated by the lease. *Gilbert, Hedge & Co. v. Greenbaum, Schroder & Co. et al.*, 211.
2. ———: **WHEN ENFORCEABLE.** Where a building was leased as a store-room, and occupied with a stock of merchandise, it was held that the ex-

uction of a mortgage on the stock by the tenant rendered the lien of the landlord for the rent of the entire unexpired term of the lease enforceable, and that such lien was superior to that of the mortgage. *Id.*

8. ———: EFFECT OF RECEIVERSHIP. The lien of a landlord will not be defeated by the conversion of the property of a tenant into money by a receiver, under an order of court, but will attach to the proceeds in the receiver's hands. *Id.*
4. LIEN FOR RENT: PRIORITY OF LIENS. Where during the term of a lease another was executed between the same parties and covering the same property, it was held that, while the execution of the second lease operated as a cancellation of the first, as between the parties, the lien of the landlord for rent under the second, upon property kept on the premises at the time of the change, would not be postponed by reason thereof to that of a chattel mortgage executed by the lessee prior to such change, and of which the lessor had no knowledge at the time. *Rollins v. Proctor et al.*, 326.
5. ———: WAIVER OF. The right to a landlord's lien for rent is not waived by the taking of personal security for the performance of the covenants of a lease, unless such is the intention of the parties. *Id.*

See JUSTICE OF THE PEACE, 2.

LIEN.

See ATTORNEY'S LIEN.

LANDLORD AND TENANT, 1, 2, 3, 4, 5.

MECHANIC'S LIEN.

MORTGAGE, 2, 3, 6, 7.

LIFE INSURANCE.

1. PROCEEDS OF: WILL. The proceeds of a policy of life insurance which is payable to another than the insured do not constitute assets of his estate, and cannot be disposed of by him by will. *McClure v. Johnson*, 620.

See ADMINISTRATOR 4, 5.

MANDAMUS.

See SCHOOLS, 1.

MASTER AND SERVANT.

See RAILROADS, 12, 13, 14, 15, 16, 17, 18.

MECHANIC'S LIEN.

1. WHO IS ENTITLED TO: IMPLIED CONTRACT FOR LABOR. One who performs labor for a contractor in the erection of a building may establish a lien against the building therefor, though no express contract for payment was made. *Foerder v. Wesner et al.*, 157.
2. ———: FOREMAN. The fact that one who performs labor on a building also acts as overseer of other workmen will not defeat his right to a mechanic's lien. *Id.*

3. **TAKING OF COLLATERAL SECURITY: WHAT IS NOT.** The fact that a husband, who, as agent for his wife, contracts for materials to be used in the erection of a building on her land, also binds himself by such contract to pay therefor, will not constitute the taking of collateral security by the material man so as to defeat his right to a mechanic's lien. *Bissell v. Lewis et al.*, 231.
4. **PRIORITY OF LIENS.** As against those at the time holding junior liens, the amount of an existing mechanic's lien cannot be increased by an agreement of the owner to pay ten per cent interest and attorney's fees. *Id.*
5. **VALIDITY OF: DESCRIPTION OF PROPERTY.** The fact that the description in a statement for a mechanic's lien includes other property in addition to that owned by the person against whom the lien is claimed will not invalidate the lien. *Id.*
6. ———: **TAKING OF COLLATERAL SECURITY.** The taking of collateral security, after the completion of the work or the furnishing of the materials for which a lien is claimed, will not invalidate the lien though the building is not at the time completed. *Id.*
7. ———: **FILING OF STATEMENT.** As against the holders of other existing liens, it is not essential to the validity of a mechanic's lien that a statement and claim therefor should be filed with the clerk. *Id.*
8. **STATUTE OF LIMITATIONS: WHEN IT BEGINS TO RUN.** Section 2529 of the Code, in fixing the time within which an action to enforce a mechanic's lien may be brought, has reference to the thirty or ninety days allowed for the filing of claims by sub-contractors and contractors respectively under the mechanic's lien law, and the statute begins to run against an action at the expiration of such time, if the claim is not sooner filed. *Squier et al. v. Parks et al.*, 407.
9. **IMPROVEMENT UPON LAND: BREAKING PRAIRIE.** The breaking of prairie is not an improvement upon land such as will entitle the person doing the breaking to a mechanic's lien therefor. *Brown v. Wyman et al.*, 452.

See STATUTE OF LIMITATIONS 4, 5.

MORTGAGE.

1. **TO SCHOOL FUND: COUNTY AUDITOR.** A county auditor has no power to release real estate from a mortgage executed thereon to the county for the use of the school fund. *Madison County v. Kridler et al.*, 32.
2. **PRIORITY OF LIENS: RECORDING LAW.** Section 1944 of the Code, providing that the indexing of a deed or mortgage by the recorder, after it is filed for record, shall constitute constructive notice of the rights of the grantee therein, contemplates the remaining of the instrument in the recorder's office until recorded, which is required to be as soon as practicable thereafter. Where a mortgage was withdrawn from the recorder's office after being indexed, and was not recorded for two years, it was held that third parties acquiring rights in the property in the meantime, in good faith, and without knowledge of the existence of the mortgage, were not charged with notice thereof by the records. *Yerger v. Bars et al.*, 77.
3. ———: **ASSIGNMENT.** As to priority between the holders of different mortgages, an assignee occupies no better position than his assignor. *Id.*
4. **ASSIGNEE OF: FAILURE TO SATISFY OF RECORD.** The assignee of a mortgage, by an assignment which does not appear of record, is not

- subject to the statutory penalty imposed on a mortgagee for a failure to enter a satisfaction of his mortgage upon the record when paid. *Low et al. v. Fox*, 221.
5. ON CHATTELS: DESCRIPTION. A chattel mortgage on "goods, wares and merchandise," then in stock in a certain store-room and to be added to replenish such stock, was held to cover barrels of salt kept for sale as a part of the stock and stored in a shed used in connection with the store, and also barrels of kerosene oil which had been temporarily removed from the store. *Stephens v. Pence*, 257.
 6. REDEMPTION FROM TAX SALE: LIEN. A mortgagee who redeems the mortgaged property from tax sale is entitled to a lien for the amount paid in addition to the amount of his mortgage. *Broquet v. Sterling et al.*, 357.
 7. STATUTE OF LIMITATIONS: PRIORITY OF LIEN. A note and mortgage which have become barred by the statute of limitations may be revived by an admission of indebtedness by the mortgagors, and the priority of the mortgage lien will thereby be preserved as against subsequent liens, taken before the mortgage became barred and not foreclosed until after it is revived. *Day v. Baldwin*, 34 Iowa, 380, distinguished. *Kerndt & Bros. v. Porterfield et al.*, 412.
 8. ASSIGNEE TAKES SUBJECT TO DEFENSES. A mortgage is not a negotiable instrument, and an assignee, although purchasing before maturity, takes it subject to all defenses existing against it in the hands of the mortgagee. *Tabor v. Foy*, 539.
 9. CANCELLATION OF: POWER OF ATTORNEY. A power of attorney which authorized an agent to cancel a mortgage on certain described real estate, and the notes secured thereby, and to take new notes and a new mortgage, of the same terms, in place thereof from another person, was held to contemplate a new mortgage on the same property, and the cancellation of the old mortgage thereunder without the taking of a new one was held to be void as against a subsequent mortgagee, who was charged by the record with notice of the terms and conditions on which the cancellation was authorized. *Foster v. Paine et al.*, 622.

See AD QUOD DAMNUM, 1.

CROPS, 1.

EQUITABLE JURISDICTION, 4.

LANDLORD AND TENANT, 2.

PRACTICE, 1.

MUNICIPAL CORPORATIONS.

1. CONTROL OF STREETS: LIABILITY FOR PERSONAL INJURY. Section 465 of the Code confers on incorporated towns full control over their streets, and a town cannot escape liability for an injury sustained by reason of the unsafe condition of its streets on the ground that they were put in such condition by the supervisor of the road district. *Clark v. The Town of Epworth*, 462.
2. REGULATING SALE OF WINE AND BEER: CONDITIONS IMPOSED. A city or town incorporated under the general law has no power to enact provisions in an ordinance intended to regulate the sale of wine and beer, making it a condition of the granting of a license therefor that the person to whom it is issued shall not sell liquors the sale of which is pro-

hibited by the laws of the State, nor suffer or permit gambling on the premises occupied by him, and imposing penalties for the violation of such conditions, to be collected by action on the bond of the licensee. An ordinance so providing is void, and no action can be maintained on the bond to recover such penalties. *BROOK, J., dissenting. The Town of New Hampton v. Conroy et al.*, 298.

See ESTOPPEL, 1.

NEGLIGENCE.

1. **WHAT IS CONTRIBUTORY: DEFECTIVE SIDEWALK.** An instruction as to contributory negligence, in an action to recover from a city for injuries received by reason of a defective sidewalk, considered and held erroneous. *Munger v. The City of Marshalltown*, 216.
2. **RAILROADS: RUNNING OF TRAIN.** Where a caboose and two cars, a half mile or more from the point where they became detached from the remainder of the train, ran over and killed the plaintiff's intestate, it was held that the conductor and brakeman, who were in the cupola of the caboose, were negligent in not sooner discovering the fact that they were detached, and in not being upon the tops of the cars where they could control their motions, and give warning of danger. *Farley v. C., R. I. & P. R. Co.*, 337.
3. ———: **CONTRIBUTORY NEGLIGENCE.** An employe of a railroad, whose duty required him to go a distance of about four hundred feet along the line of the track, and across the same, after waiting until a train had passed, stepped upon the track behind it, walking in the same direction it was moving, and was run over and killed by cars which had become detached and were following the train: *Held*, that he was not guilty of contributory negligence. *SEEVERS, J., dissenting*, holds that whether or not the deceased was rightfully on the track in the performance of his duty was a question for the jury. *Id.*
4. ———. The verdict in an action to recover for the negligent killing of the plaintiff's intestate on the defendant's railroad held authorized by the evidence and instructions given. *SEEVERS, J., dissenting. Id.*

See PRACTICE, 34.

RAILROADS, 1, 2, 9, 10, 11, 12, 13, 14, 15,
16, 17, 18, 19, 20.

NOTICE.

See ACTION, 1.

ATTORNEY'S LIEN, 1, 2, 4.

GUARANTY, 1.

PRINCIPAL AND AGENT, 1.

TAX SALE AND DEED, 5, 7.

OFFICIAL BOND.

1. **WHEN NOT REQUIRED: WARDEN OF ADDITIONAL PENITENTIARY.** The warden of the additional penitentiary at Anamosa, whose duties are defined by the statute to be the same as those prescribed for the warden of the penitentiary at Fort Madison, so far as applicable, is not required

thereby to execute a bond, that given by the warden at Fort Madison being required before he enters upon his office, and not as an official duty. *The State v. Heisey et al.*, 404.

2. —: EFFECT OF. Where a public officer executes an official bond which is not required by the statute such bond is void for want of consideration. *Id.*

PARENT AND CHILD.

1. CUSTODY OF CHILD: DIVORCE. A modification of a decree of divorce, changing the custody of the child of the parties from the mother to the father, considered and approved. *Sherwood v. Sherwood*, 608.

See DIVORCE, 1.

PARTIES.

1. JOINDER. In an action in equity, where a part of the relief asked is the cancellation of a contract, one of the parties to such contract may properly join as a plaintiff. *McMurray et al. v. Van Gilder*, 605.

PARTNERSHIP.

1. REQUISITES OF: SHARING IN LOSSES. One who receives a share of the profits of a business in payment for his services in managing the same, but does not share in the losses, is not a partner therein. *Holbrook & Bro. v. Oberne, McDaniel & Co. et al.*, 324.

See SALE, 2.

PAYMENT.

1. NOTE: WHETHER PAYMENT OR PURCHASE. Where a party, in pursuance of a contract for the purchase of mortgaged property, sent the amount of certain overdue coupons to the trustee holding the mortgage, with a proposition to pay such coupons on condition the trustee would not insist on a forfeiture on account of the default, and the coupons were canceled and returned to him, it was held that the transaction constituted a payment and not a purchase, and extinguished the indebtedness of the mortgagor on the coupons, although the contract to purchase the property was afterward abandoned. *Bissell v. Lewis et al.*, 231.

See PRINCIPAL AND AGENT.

PROMISSORY NOTE, 4.

PLEADING.

1. ANSWER: DENIAL. The allegations of an answer in an action on account considered and held not to put in issue the correctness of the account set out in petition, except as to certain specific items. *Rodefer v. Myers*, 227.
2. SUFFICIENCY OF ALLEGATION. In a pleading claiming to recover on a policy of insurance, a statement of the amount of the policy and that such amount is due thereon is a sufficient averment of the amount of the loss, in the absence of objection thereto before trial. *Revere Fire Insurance Company v. Chamberlin et al.*, 508.
3. ALLEGATION OF FRAUD: INSUFFICIENCY OF. A pleading which simply avers fraud as a legal conclusion, without stating the facts constituting

it, is insufficient, and may properly be stricken out on motion. *Mason v. Searles et al.*, 532.

4. **ACTION TO SET ASIDE JUDGMENT.** A pleading attacking a judgment as excessive must state the facts relied upon to establish such claim. A general averment of excess is not sufficient. *Byers v. Odell*, 618.
5. **AMENDMENT: STATUTE OF LIMITATIONS.** An amendment to a petition held to set up a new and distinct cause of action, which at the time the amendment was filed had become barred by the statute of limitations. *Van de Haar v. Van Domseker*, 671.
6. **ISSUES RAISED BY: FORCIBLE ENTRY AND DETAINER.** Where in an action of forcible entry and detainer, before a justice of the peace, the petition does not set up title in the plaintiff, an answer denying plaintiff's title and averring title in the defendant is not responsive to the petition, and does not raise an issue involving the title to the property which requires the removal of the action to the Circuit Court. *Jordan v. Walker*, 686.

See DAMAGES, 1.

PRACTICE, 5, 10, 11, 24, 26, 29, 31, 32, 34.

POSSESSION.

See TAX SALE AND DEED, 3.

PRACTICE.

1. **FORECLOSURE OF MORTGAGE: PLACE OF BRINGING SUIT.** Section 2178 of the Code, providing that mortgages may be foreclosed in the county where the property is situated, is permissive only; an action to recover on a note, and to foreclose a mortgage securing it, may be brought in the county where the note is made payable, though other than that in which the mortgaged property is situated, and this although the mortgage was executed while the Revision was in force, which required the foreclosure to be made in the county where the land was situated, the change in the statute being one which does not substantially affect the rights of the parties. *The Equitable Life Insurance Co. of Iowa v. Gleason et al.*, 47.
2. **ACTION OF TORT: JOINDER OF DEFENDANTS.** In an action to recover for a tort, in which two are joined as defendants and it is alleged that the tort was committed by them jointly, the jury may find that it was committed by one defendant alone, and judgment may properly be rendered against him therefor. *Boswell & Tobin v. Gates et al.*, 143.
3. **INSTRUCTIONS: ASSUMPTION OF FACTS.** It is competent for the court to assume, as a basis for instruction to the jury, the existence of facts which are admitted or established by uncontradicted evidence, and unless the contrary is shown it will be presumed that facts so assumed are thus established. *Wood v. Porter*, 161.
4. **VERDICT: ERROR WITHOUT PREJUDICE.** A party is not deprived of his right to a judgment on the verdict of a jury in his favor by the fact that special interrogatories were erroneously submitted to the jury by the court, where the answers to such interrogatories in no manner conflict with the general verdict, and their submission could not have been prejudicial. *Petrie v. Boyle et al.*, 163.

5. **PLEADING: GARNISHMENT.** Where a single pleading was filed controverting the answers of two garnishees, and on motion one of the garnishees was dismissed therefrom as improperly joined therein with his co-garnishee, it was held that the plaintiff was entitled to file a further pleading taking issue upon the answer of such garnishee. *Coffman v. Ford*, 185.
6. **EFFECT OF GRANTING NEW TRIAL.** The granting of a new trial operates to vacate the judgment rendered on the former trial, although it has been formally entered of record. *Low et al. v. Fox*, 221.
7. **EVIDENCE.** Where evidence offered is not objected to, the adverse party cannot insist in the Supreme Court, for the first time, that such evidence was not properly before the trial court. *Stephens v. Pence*, 257.
8. **ACTION ON WRITTEN INSTRUMENT: DENIAL.** In an action on a written lease, which was set out in the petition, and the execution of which was not denied under oath, it was held erroneous to submit the question of its execution to the jury. *Templin v. Rothweiler et al.*, 259.
9. **OFFER TO CONFESS JUDGMENT: COSTS.** To entitle a defendant to costs by reason of an offer to confess judgment, under section 2399 of the Code, such offer must be confined to the matters in suit. *Phillips v. Shearer*, 261.
10. **PLEADING: CHARACTER OF DEFENSE.** In a proceeding by a widow for the admeasurement of her dower, an intervenor set up a conveyance through which he claimed title to certain lands from her and her deceased husband, to which she replied by averring that the instrument through which the intervenor claimed never became operative as a conveyance, because of his failure to perform certain covenants therein, which constituted a condition precedent: *Held*, that the issues raised by her reply were of a purely legal character. *In the matter of the application of Elizabeth Smith*, 270.
11. ———: **ISSUES RAISED BY.** The issues raised by the pleadings held to warrant the decree entered. *Jordan et al. v. Brown et al.*, 281.
12. **FINDING OF FACTS.** A finding of facts may be made by the court on its own motion, and when so made has the same force and effect as though made at the request of the parties. *Jennings v. Jennings*, 288.
13. **CONTINUANCE: DILIGENCE.** An application for a continuance to procure testimony held to have been correctly overruled for want of a sufficient showing of diligence. *Argall et al v. Pugh*, 308.
14. **KIND OF PROCEEDINGS: DEMURRER.** The fact that a petition to secure a modification of an order made in a probate proceeding is entitled in equity is not ground for demurrer. *Ashlock v. Sherman et al.*, 311.
15. **PROBATE COURT: POWERS OF.** The probate court has the power to modify orders previously made by it, on a proper showing therefor. *Id.*
16. **OFFER TO REDEEM FROM TAX SALE: COSTS.** Where a plaintiff offers to redeem from a tax sale of property to the defendant, which redemption is decreed upon a trial, the plaintiff is entitled to recover the costs of such trial. *Broquet v. Sterling et al.*, 357.
17. **ACTION BROUGHT IN WRONG COUNTY: TRANSFER OF.** Upon the transfer of an action begun in the wrong county to that of the defendant's residence, the original papers are required to be filed in the court to which the transfer is made, and where they are not so filed ten days be-

fore the next ensuing term of such court, the cause will be deemed discontinued. Such omission is not waived by the appearance of the defendant to move a dismissal of the action. *Hall v. Royce*, 359.

18. **CLAIM AGAINST ESTATE: ERROR IN PROCEEDINGS.** The fact that a claim against an estate, which should have been prosecuted by proceedings in probate, is sued in an ordinary action at law against the administrator is not ground for demurrer. *McName v. Matrin et al.*, 362.
19. ———: **JUDGMENT AGAINST ADMINISTRATOR.** A judgment rendered against an administrator, in an action wherein the court acquired jurisdiction of both parties and subject-matter, cannot be set aside on the ground that the claim was not regularly prosecuted in accordance with the statute governing the establishment of claims against estates. *Id.*
20. **CANCELLATION OF JUDGMENT.** A judgment or order of court will not be set aside or modified unless affirmative and prejudicial error is shown therein. *The County of Pottawattamie v. The County of Marshall*, 410.
21. **APPEAL: WAIVER OF.** One who, after the overruling of his application to be substituted as a party to an action, amends his application, which is then granted, by his amendment waives his right of appeal from the former ruling. *Bixby v. Blair & Company et al.*, 416.
22. **ACTION AGAINST SHERIFF: SUBSTITUTION OF DEFENDANTS.** In an action against a sheriff to recover property taken by him under process, a joint application by the sheriff and the person in whose favor the process issued, to have the latter substituted as defendant, may be made at any time, although an answer has been previously filed by the sheriff. *Id.*
23. **REMOVAL OF CAUSES.** In passing upon an application for the removal of a cause to the federal courts the affidavits accompanying the petition for removal should be considered as a part thereof, and the decision should be based on the facts shown by the whole record. *Id.*
24. **PLEADING: COUNTER-CLAIM.** In an action on a promissory note a defendant may by counter-claim attack the validity of the note and ask an affirmative judgment in his favor, and such counter-claim will not be rendered inadmissible by the fact that it is in the nature of a petition in replevin, and prays possession of the note, such relief being equivalent to its cancellation. *Sigler v. Hidy et al.*, 504.
25. **COUNTER-CLAIM: DISMISSAL OF ACTION.** The dismissal of an action on a promissory note without prejudice by the plaintiff will not entitle him to a dismissal of a counter-claim asking a cancellation of the note. *Id.*
26. **PLEADING: COUNTER-CLAIM.** In an action in equity for the cancellation of a policy of insurance issued by the plaintiff, it was held that the defendant might by way of counter-claim set up a cause of action on the policy for loss of the property insured, such cause of action being "connected with the subject of the action," within the meaning of section 2659 of the Code. *Revere Fire Insurance Company v. Chamberlin et al.*, 508.
27. **BILL OF EXCEPTIONS: SKELETON BILL.** A skeleton bill of exceptions must identify the papers to be inserted by the clerk so as to leave nothing to his discretion. *Wells v. The B., C. R. & N. R. Co.*, 520.
28. **ATTORNEY'S FEE: WHEN TAXABLE AS COSTS.** When an attorney's fee is authorized to be taxed as costs it may be fixed by the court without a

jury, but after an appeal is taken in the action it cannot properly be fixed until such appeal is determined. *Mason v. Searles et al.*, 532.

29. **PLEADING: WAIVER OF IRREGULARITY.** Where a material allegation is omitted from a pleading, but the adverse party fails to demur thereto, and himself tenders an issue upon the point, which issue is found against him, the judgment based on such finding will not be reversed on account of the irregularity. *The Union National Bank of Chicago v. Barber et al.*, 559.
30. **LAW OF THE CASE: WHAT IS.** While in general a decision of the Supreme Court constitutes the law of the case in which it is made, yet if such decision is overruled before the final trial of the case it is the duty of the inferior court in such trial to follow the rule last established. *Barton v. Thompson*, 571.
31. **PLEADING: AMENDMENT.** An amendment to a petition may be filed without leave of court at any time before answer, and notice of such amendment to the adverse party is waived by an appearance thereto; an amendment to a petition on account setting up a draft signed by the defendant, and alleging that the indebtedness thereon is the same as that shown by the account, is not inconsistent with the petition and does not render necessary a new original notice. *Kimball & Mitchell v. Bryan*, 632.
32. ———: ———. A party may thus plead the same indebtedness in different counts without rendering the pleading subject to demurrer. *Id.*
33. **CONTINUANCE.** A showing for continuance held insufficient. *Id.*
34. **PLEADING: NEGLIGENCE.** Where a petition claimed to recover of a railroad company for a personal injury caused by the negligent acts of co-employees, which acts were set out, it was held erroneous to refuse to instruct the jury that negligence must be proved in the manner alleged to authorize a recovery. *Manuel v. The C., R. I. & P. R. Co.*, 655.
35. **CONTRACT: CONSTRUCTION OF LETTERS.** The question whether or not certain letters constitute a contract is one to be determined by the court, and it is error to submit such question to a jury. *Lea & Beaman v. Henry*, 662.
36. **MOTION FOR NEW TRIAL: CONTINUANCE.** It is not required that a motion for a new trial shall be determined during the term at which it is filed, and when not so determined it stands continued generally, without any record entry, and may be taken up at the next succeeding term. *Van de Haar v. Van Domseler*, 671.
37. **FINDING: PRESUMPTION OF REGULARITY.** Findings of fact or law made by a court will be presumed to have been made in compliance with the provisions of the statute authorizing such findings, unless the contrary is shown. *McCue v. The County of Wapello*, 698.
38. **APPEAL: FROM INTERLOCUTORY ORDER.** The statute does not give a right of appeal from an order granting a change of venue, but an appeal properly taken from an interlocutory order affecting substantial rights, brings up for review all rulings theretofore made in the action and duly excepted to. *Allerton v. Eldridge*, 709.

39. **CHANGE OF VENUE.** A change of venue may be had on the ground of the prejudice of a judge, on a proper showing, although the term of the presiding judge expires before the next ensuing term of court, which is the first term at which the case can be tried. *Id.*

See CONTRACT, 4.

EQUITABLE JURISDICTION, 2.

EVIDENCE, 7, 10.

INTERVENTION, 1.

PARTIES, 1.

PRACTICE IN THE SUPREME COURT.

1. **TRIAL DE NOVO: WAIVER OF IRREGULARITY.** After having argued a case on appeal to the Supreme Court as though it were triable *de novo*, an appellee cannot in a reply, upon purely technical grounds, insist that it is not so triable. *Kendrick et al. v. Eggleston et al.*, 128.
2. **APPEAL: JUDGE'S CERTIFICATE.** The certificate of the trial judge, in a case involving less than one hundred dollars, held insufficient to raise any question for the consideration of the Supreme Court. *Brown v. Petrie et al.*, 209.
3. **ASSIGNMENT OF ERROR.** An assignment of errors considered and held insufficient. *Low et al. v. Fox*, 221.
4. **CORRECTNESS OF ABSTRACT.** An appellee can only question the correctness of the appellant's abstract by filing an amended abstract. *Van Winkle v. The Iowa Iron and Steel Fence Co. et al.*, 245.
5. **ABSTRACT: MOTION TO STRIKE.** An abstract must be based on the record in the court below, and where it is shown that no evidence was made of record in a cause, what purports to be the evidence set out in the abstract will be stricken therefrom on motion. *Mudge v. Agnew*, 297.
6. ———: **AMENDMENT.** An amendment to the appellant's abstract, filed by him without leave after the filing of the appellee's argument, will not be considered. *In the Matter of the Will of Mary M. Caywood*, 301.
7. **TRIAL DE NOVO.** To authorize the trial *de novo* of an equity case by the Supreme Court, all the evidence offered, as well as introduced, on the trial below must be before the court, and must have been certified by the judge at the trial term. *Argall et al. v. Fugh*, 308.
8. ———. An equity case triable *de novo* can be reviewed only on errors assigned, and as to questions raised in the trial court. *Id.*
9. **ABSTRACT: CERTIFICATE OF EVIDENCE.** A certificate of the trial judge that the record in a case contained all the evidence "adduced" on the trial was held insufficient to authorize a trial *de novo*, on appeal, where the abstract showed that evidence offered and rejected was not contained therein. *Tuttle v. Story County et al.*, 316.
10. **BILL OF EXCEPTIONS: TIME FOR SIGNING.** In criminal as well as civil actions the evidence must be preserved by bill of exceptions, or certificate of the trial judge, made at the trial term or within the time then fixed therefor by the court, and a judge's certificate or bill of exceptions, signed after the expiration of such time, will not be considered by the Supreme Court. *The State v. Newcomb*, 335.

11. **FILING OF ARGUMENT.** Facts considered under which it was held that an argument would not be stricken from the files, but not being filed within the time prescribed, the cost of printing should be taxed to the party making it. *Smith v. McFadden*, 482.
12. **ABSTRACT.** Where an appellee files an additional abstract setting out evidence not contained in that of the appellant, he cannot deny that all the evidence is preserved in the court below, and presented to the Supreme Court in the abstracts. *Wells v. The B., C. R. & N. R. Co.*, 520.
13. **ACTION TRIABLE DE NOVO: ERRORS.** Neither the allowance of amendments to pleadings after decree, nor the improper admission or exclusion of evidence in the court below, are grounds for reversal in an action triable *de novo* by the Supreme Court. *Tabor v. Foy*, 539.

See **APPEAL**.

INSTRUCTIONS, 1.

PRINCIPAL AND AGENT.

1. **NOTICE TO AGENT: WHEN BINDING ON PRINCIPAL.** The rule that notice to an agent is notice to his principal applies only to knowledge acquired by the agent in the particular transaction, or which, if previously acquired, is still present in his mind at the time of his agency. *Yerger v. Barz et al.*, 77.
2. **PROMISSORY NOTE: PAYMENT.** Authority to sell property as agent, and take a note therefor in the name of the principal, does not include authority to receive payment of the note after it has been delivered to the principal. *Draper v. Rice*, 114.
3. **BANKS AS COLLECTING AGENTS: NEGLIGENCE OF CORRESPONDENTS.** Where the holder of a bill of exchange payable at a distant place deposits it with a local bank for collection, he thereby assents to the course of business of banks to collect through correspondents, and the correspondent of the local bank to which the bill is forwarded becomes his agent and is responsible to him directly for negligence in failing to present the bill for payment within the proper time. *Guelich v. The National State Bank of Burlington*, 434.
4. **AUTHORITY TO APPOINT SUB-AGENT.** Where an agent was authorized by the owners to sell certain land, exercising his own discretion as to price and terms after an examination of the land, it was held that he might properly employ a sub-agent to find a purchaser, and that a sale made by such sub-agent was binding upon the owners. *Renwick v. Bancroft et al.*, 527.
5. **RATIFICATION OF UNAUTHORIZED CONTRACT.** A principal who accepts the benefit of an unauthorized contract made by his agent must take also the obligations which form a part of it. *Beidman v. Goodell et al.*, 592.
6. ———: **RULE APPLIED.** An agent for the owner of a note and mortgage took new notes for the debt, and in consideration of their being signed by the wife of the maker, who was not a party to the former note, agreed to cancel the mortgage. His principal having brought suit and taken judgment against both husband and wife on the notes, it was held that he could not also enforce the mortgage. *Id.*

PROMISSORY NOTE.

1. **INDORSEMENT BY AGENT.** Where an indorsement of a promissory note is made by the agent of the payee it is not essential to its validity that the agent's authority should appear upon the note. *Bettis v. Bristol*, 41.

2. **PLACE OF PAYMENT: CONSTRUCTION.** Where a promissory note was made payable at the office of the payee, the Equitable Life Insurance Company of Iowa, and the heading of the note was as follows: "Office of Equitable Life Insurance Company, Des Moines, Iowa," it was held that the note, taken as a whole, showed that it was payable at Des Moines. *The Equitable Life Insurance Co. of Iowa v. Gleason et al.*, 47.
3. **NEGOTIABILITY:** A promissory note in the ordinary form contained the following clause immediately preceding the signature: "If this agent does not sell enough in one year, one more is granted:" *Held*, that such provision rendered the note non-negotiable. *DAY, J., and ADAMS, CH. J., dissenting. Miller v. Poage*, 96.
4. **EVIDENCE TO VARY TERMS OF: PAYMENT.** The maker of a note cannot show, as a defense thereto, that he has paid it to another than the payee, in accordance with a contemporaneous parol agreement, differing in its terms from the note. *Draper v. Rice*, 114.
5. **SURETY: DISCHARGE OF.** Where, after a note has been signed by the principal maker and a surety, and delivered to the payee, it is signed by others as sureties, without the knowledge and consent of the one first signing, he is thereby discharged from liability thereon. *Berryman v. Manker*, 150.
6. ———: ———. The fact that the additional sureties signed the note in pursuance of an agreement between the principal and the payee, made at the time the note was delivered, will not prevent the discharge of the first surety. *Id.*
7. **LIABILITY OF INDORSER: DEMAND.** Where the maker of a negotiable promissory note removes from the State before its maturity, leaving no one to represent him, no demand of payment is necessary to bind an indorser. *Whitely v. Allen*, 224.
8. **FAILURE OF CONSIDERATION: VENDOR AND VENDER.** A contract for the sale of land provided that in case of default in payment of any of the notes given for purchase money the vendor might declare a forfeiture and resume possession of the land, and that all payments theretofore made should be forfeited as liquidated damages for the breach of the contract; on the maturity of one of the notes a part payment was made by the vendee, and a new note for the remainder and accrued interest on the other notes was executed; for subsequent defaults the vendor declared the contract forfeited and resumed possession of the land: *Held*, that such forfeiture constituted a failure of consideration of the note executed in renewal. *Montelius v. Wood*, 254.
9. **ACTION ON: JOINT OWNERS.** One of two joint owners of a promissory note cannot maintain an action thereon in his own name without joining the other owner, though the note is payable to bearer and is in his possession. *McNamee v. Carpenter*, 276.
10. **MATERIAL ALTERATION: SEVERANCE OF CONTRACT.** Where a contract, all written upon one paper, is severed, leaving one portion in the form of a negotiable promissory note, signed by one of the parties, such severance constitutes a material alteration of the contract, and no recovery can be had on the note, even in the hands of a *bona fide* purchaser for value before maturity, unless the maker is chargeable with gross negligence in its execution. *Scofield v. Ford*, 370.
11. **HOLDER OF: WHEN TAKEN AS COLLATERAL.** One who receives a promissory note as collateral security for an antecedent debt, upon which no extension is granted, does not become a *bona fide* holder for value. *The Union National Bank of Chicago v. Barber et al.*, 559.

12. ———: PRESUMPTION OF OWNERSHIP. The holder of a promissory note is presumed to be the owner thereof by a *bona fide* transfer for value, but such presumption is rebutted by evidence showing that the note is in fact the property of another, from whose possession it was procured by fraud. *Id.*
13. RECOVERY ON DESTROYED NOTE. A recovery can be had on a note which has been destroyed only when it is clearly shown that such destruction was the result of accident or mistake; where it was in pursuance of a fraudulent scheme of the holder no recovery is permissible. *McDonald v. Jackson*, 643.
14. REFORMATION OF: EVIDENCE CONSIDERED. Evidence considered and held insufficient to establish a mistake in a promissory note, such as would warrant its reformation. *George v. Howard et al.*, 646.

See PAYMENT, 1.

PRACTICE, 1.

PRINCIPAL AND AGENT, 2.

PUBLIC LANDS.

1. CONSTRUCTION OF GRANT: RAILROADS. *Courtright v. The C. R. & M. R. R. Co.*, 35 Iowa, 386, followed and held decisive of the present case, as to the proper construction of the land grant involved. *Miller et al. v. The Iowa Land Company, et al.*, 374.

PUBLIC OFFICER.

1. LIABILITY FOR OFFICIAL ACTS. The trustees of a public institution, who are charged by the statute with its general supervision, and required to perform all acts necessary to render it efficient, are not personally liable in damages for the cancellation of a contract of employment made by them, and a refusal to allow the employe to enter upon his duties thereunder, though such action upon their part is wrongful, unjust, and illegal. *Chamberlain v. Clayton et al.*, 331.
2. OFFICER DE FACTO: RIGHT TO FEES. The rule of law recognizing an officer *de facto* in discharging the duties of the office is for the benefit of the public and does not extend to controversies between him and the officer *de jure*, as against whom he must be considered an intruder, and not entitled to claim the emoluments of the office, the right to which is dependent upon the right to its possession. *McCue v. The County of Wapello*, 698.

See OFFICIAL BOND, 2.

RAILROADS.

1. NEGLIGENCE: SIGNALS AT CROSSINGS. In actions to recover for injuries received by the plaintiffs, by reason of the frightening of the team they were driving, caused by the sudden opening of the escape valves of an engine attached to one of defendant's trains, standing at a public crossing, it was held that the fact that the defendant did not provide a flagman at the crossing, or give other signals to warn the plaintiffs of the movements of the engine, should be considered in determining the question of the defendant's negligence, such signals being required not alone to prevent collisions, but to enable travelers upon the highway to guard against other accidents as well. *Hart v. C., R. I. & P. R. Co.*, 166.

2. ———: ———. The defendant, in the use of its road, was bound to exercise reasonable care and diligence to prevent injury to the persons and property of those lawfully using the highway, and whether it did so or not was a question for the jury, under all the evidence. *Id.*
3. CONTRACT FOR THE RIGHT OF WAY: FORECLOSURE. *Varner v. The St. L., & C. R. R. Co. et al.*, 55 Iowa, 677, holding that a contract for right of way may be foreclosed, and a judgment for damages for the failure of the railroad company to comply with the same may be rendered and established as a lien upon the portion of the road covered by the contract, followed. *Davis et al. v. The St. L., K. C. & N. R. Co. et al.*, 192.
4. INJURY TO STOCK: EVIDENCE. A paper shown to be similar to an affidavit of the killing of stock, served on a railroad company, but not a copy, is not admissible to prove the contents of the affidavit. *Kyser v. The K. C., St. J. & C. B. R. Co.*, 207.
5. ———. A railroad company is not liable in damages, under the statute, for stock killed by its trains on depot grounds. *Id.*
6. DISCRIMINATION IN CHARGES: CONSTRUCTION OF STATUTE. No recovery can be had from a railroad company under section 10, of chapter 68, laws of 1874, for discrimination in charges for cars between different shippers of stock, unless it is shown that the shipments were made upon like conditions. *Paxon et al. v. The Illinois Central R. Co.*, 427.
7. KILLING OF STOCK: EVIDENCE. Proof that a notice and affidavit of the killing of stock served on a railroad company were similar to others introduced in evidence is insufficient. *Kyser v. The K. C., St. J. & C. B. R. Co.*, 440.
8. ———: ———. Evidence and instructions in an action to recover double damages for stock killed on a railroad considered. *Id.*
9. NEGLIGENT CONSTRUCTION: EVIDENCE. In an action to recover damages sustained by reason of the negligent construction of a railroad over the plaintiff's farm, the fact that the road is built as railroads usually are in such locations is no defense. *Van Orsdol v. The B., C. R. & N. R. Co.*, 470.
10. DAMAGES. Where it is practicable in the building of a railroad to construct a culvert which will allow the passage of the water of a stream in its natural channel, it is negligence not to do so, and a land-owner injured by such failure may recover damages. *Id.*
11. ———: ———. A right of action to recover for permanent injuries to land resulting from the negligent construction of a railroad thereon accrues at the time the first injury is sustained, and not necessarily from the date of the construction of the road. *Id.*
12. NEGLIGENCE: WAIVER BY EMPLOYEE. Where it was shown that a brakeman, who was knocked from the top of a freight car by a bridge, had been employed on the same portion of the road for several years, and knew the height of the bridges, but remained in the service without protest, it was held that he thereby waived the negligence of the company in that regard. *Wells v. The B., C. R. & N. R. Co.*, 520.
13. PERSONAL INJURY: NEGLIGENCE. The plaintiff was employed by the defendant on a construction train, and in the discharge of his duty he walked to the rear of the train while in motion; when within five feet of the rear end of the last flat car, in front of the caboose, the latter was uncoupled by the conductor, who warned the plaintiff to stop, and at a signal the engineer increased the speed of the train with a sudden jerk,

which threw the plaintiff from the car and he was run over and injured. In an action to recover damages for such injury it was held that a verdict for the plaintiff was supported by the evidence. *Jeffrey v. The K. & D. M. R. Co.*, 546.

14. ———: EVIDENCE. In such an action it is competent for the plaintiff to show that the uncoupling of the cars while in motion was unusual. *Id.*
15. ———: ———. It is not competent for a witness testifying in regard to the customary manner of operating trains to give an opinion as to the propriety or impropriety of a given method. *Id.*
16. ———: INSTRUCTIONS. The giving and refusal of instructions considered and held to be without error. *Id.*
17. ———: CONTRIBUTORY NEGLIGENCE. The rule is that, as a matter of law, a person voluntarily going upon a railway track at a point where there is an unobstructed view of the track, and failing to look or listen for danger, cannot recover for an injury which might have been avoided by so looking or listening; but when the view is obstructed, or other facts exist which tend to complicate the question of contributory negligence, it becomes one for the jury. *Laterens v. The C., R. I. & P. R. Co.*, 689.
18. ———: ———. Evidence considered and held to sustain a finding that a person who was killed while walking on the track of a railroad was not guilty of contributory negligence precluding a recovery by his administrator. *Id.*
19. CONSTRUCTION OF ON STREETS: INSTRUCTIONS. Instructions, in an action to recover damages for injuries to property by reason of the construction of a railroad on the street adjacent, considered and held erroneous as inapplicable to the issues made by the pleadings. *O'Connor v. The St. L., K. C. & N. R. Co.*, 735.
20. ———: DAMAGES TO ABUTTING PROPERTY. In such actions the measure of damages is the difference the rental value of the property with the road as constructed and its rental value if the road had been properly constructed. *Id.*

See NEGLIGENCE, 2, 3, 4.

PUBLIC LANDS. 1.

TAXATION, 2, 3, 7.

RES ADJUDICATA.

1. COMPROMISE DECREE: ESTOPPEL. A compromise decree, entered in an action to recover on a contract, was held not to estop the defendant from denying the performance of the contract by the plaintiff in a subsequent action thereon. *The B., C. R. & M. R. Co. v. The County of Benton*, 89.
3. DISMISSAL FOR WANT OF JURISDICTION. A judgment dismissing an action for want of jurisdiction is not an adjudication which can be pleaded in bar of another action in a proper tribunal. *Roberts v. Hamilton*, 683.
3. FACTS CONSIDERED. A plea of former adjudication held erroneously sustained. *Id.*

RESIDENCE.

1. CHANGE OF: INSANE PAUPER. An insane and helpless pauper, who was removed from the county of her residence to another county that she might be continued in charge of the persons who had previously cared for her, and who was supported by the former county for a year after her removal, it was held did not acquire a settlement in the county to which she was taken, nor lose her residence in the former county. *Fayette County v. Bremer County*, 516.

SALE.

1. FRAUD: INSTRUCTIONS. Instructions in an action to set aside a sale on the ground of fraud considered and approved. *ADAMS, CH. J., dissenting. Darland & Rosencrans*, 122.
2. ———: PARTNERSHIP. The purchase by one partner of his co-partner's interest in the firm property is not rendered void for fraud because of the fact that the buyer has knowledge of his partner's insolvency, if he has no reason to suppose it is the latter's intention to defraud his creditors by the sale. *Id.*
3. EFFECT OF BILL OF SALE: FRAUD. The fact that a sale of goods is evidenced by a bill of sale duly executed and recorded will not preclude an officer seizing the goods, under process issued in actions by creditors of the vendor, from attacking the sale as fraudulent. *Singer & Benedict v. Sheldon*, 354.

See CONTRACT, 7, 18.

SCHOOLS.

1. POWERS OF DIRECTORS: MANDAMUS. The courts may by *mandamus* compel the reinstatement in the public schools of a pupil excluded under a rule of the board of directors, which is void for want of power in the board to adopt it. In any case wherein the jurisdiction and powers of directors or school officers are brought in question a party is not confined to his remedy by appeal to the county superintendent, but may maintain an original action in the courts. *ROTHROCK and SEEVERS, JJ., dissenting. Perkins v. The Board of Directors of the Independent School District of West Des Moines*, 476.
2. ———: SUSPENSION OF PUPIL. A board of directors has no power to adopt a rule which will deprive a child of school privileges except as a punishment for breach of discipline or an offense against good morals. *Id.*
3. TEACHER'S CONTRACT: WHEN NOT ENFORCEABLE. No recovery can be had on a contract to teach school, made with a subdirector, but not approved by the president of the board, unless such approval has been waived and the contract ratified by the district; the fact that the teacher proceeds thereunder and completes the performance of the contract is not sufficient to constitute such ratification and authorize a recovery. *ADAMS, J., dissenting. Place v. The District Township of Colfax*, 573.

SCHOOL DISTRICT.

1. REFUNDING ILLEGAL TAX: CHANGE OF BOUNDARIES. Where a school district from which an illegal tax had been collected, and by which it was expended, was afterwards subdivided, it was held that the county treasurer, in refunding such tax under section 870 of the Code, should

apportion the amount refunded between the different districts occupying the territory from which it was collected. *District Township of Spencer v. District Township of Riverton et al.*, 85.

2. —: CONTRIBUTION. The treasurer having refunded a portion of such tax entirely from the funds of the district having the same name as the one from which it was collected, but occupying only a portion of the territory, it was held that such district, after demand upon those occupying the remaining territory, might maintain an action against them for contribution. *Id.*

SHERIFF.

See COUNTY, 1.

STATUTES CITED, CONSTRUED, ETC.

REVISION OF 1860.

- Sec. 719. Taxation. *Wangler Bros. v. Black Hawk County*, 386.
 " 764. Tax sale. *Bullis v. Marsh et al.*, 749.
 " 772, 784. Tax sale. *Hogdon v. Green*, 734.
 " 790. Tax sale. *Bullis v. Marsh et al.*, 749.
 " 1893. Bond. *Rouley v. Jewell*, 493.
 " 2177, 2278, 2295. Homestead. *Linton v. Crosby*, 387, et seq.
 " 2309, 2361, 2370, 2403. Descent. *Ward v. Wolf et al.*, 468.
 " 2422. Descent. *Ward v. Wolf et al.*, 469.
 " 2495. Widow's share. *Ward v. Wolf et al.*, 468.
 " 2795. Venue. *The Equitable Life Ins. Co. of Iowa v. Gleason et al.*, 49.
 " 3305. Exemption. *Linton v. Crosby*, 387.

CODE OF 1873.

- Sec. 167, 168, 169. Adjournment of court. *The State v. Holmes*, 589.
 " 172. Continuance. *Van de Haar v. Van Domaster*, 673.
 " 177. Record entries. *Corpenier v. Zuter*, 394; *Traer Bros. v. Whitman et al.*, 445.
 " 183. Practice. *Byers v. Odell*, 619.
 " 195, 197. Court record. *Truer Bros. v. Whitman et al.*, 445.
 " 215. Attorney's lien. *Smith & Baylies v. The C., R. I. & P. R. Co.*, 723.
 " 285. County seat election. *Hawes et al. v. Miller et al.*, 396.
 " 321, 327. Taxes. *Barnes et al. v. The County of Marshall*, 23.
 " 456. Municipal corporations. *Town of New Hampton v. Conroy*, 500.
 " 465. Streets. *Clark v. The Town of Epworth*, 464.
 " 482. Municipal corporations. *Town of New Hampton v. Conroy*, 501.
 " 692, 716, 717. Public officer. *McLus v. The County of Wapello*, 705.
 " 797. Taxation. *Fort Des Moines Lodge No. 25, I. O. O. F. v. The County of Polk et al.*, 35.
 " 803. Taxation. *Cameron v. The City of Burlington*, 321.

- Sec. 812. Taxation. *Wangler Bros. v. Black Hawk County*, 386.
 " 823. Taxation. *Cameron v. The City of Burlington*, 321.
 " 894. Redemption. *Wilson v. Crofts*, 450.
 " 897. Tax deed. *Reed v. Thompson*, 455.
 " 902. Tax sale. *Bullis v. Marsh et al.*, 749.
 " 1182. Descent. *McClure v. Johnson*, 621; *Kelley v. Mann*, 626.
 " 1289. Railroads. *Kyser v. The K. C., St. J. & O. B. R. Co.*, 208.
 " 1363. Residence. *Fayette County v. Bremer County*, 518.
 " 1359. Jurisdiction. *County of Pottawattamie v. County of Marshall*, 411.
 " 1491, 1492, 1493. Fences. *Cooper v. Dillon et al.*, 368.
 " 1554, 1557. Intoxicating liquors. *Welch v. Jugenheimer*, 15.
 " 1686. Public officers. *Chamberlain v. Clayton et al.*, 333.
 " 1715. School districts. *District Township of Spencer v. District Township of Riverton et al.*, 87.
 " 1726. Schools. *Perkins v. The Board of Directors of The Independent School District of West Des Moines*, 480.
 " 1733. School districts. *District Township of Spencer v. District Township of Riverton et al.*, 87.
 " 1734, 1735. Schools. *Perkins v. The Board of Directors of The Independent School District of West Des Moines*, 480.
 " 1753. Schools. *Place v. The District Township of Colfax*, 573.
 " 1829, 1835. Schools. *Perkins v. The Board of Directors of The Independent School District of West Des Moines*, 478.
 " 1860, 1881. School fund mortgage. *Madison County v. Kridler et al.*, 33.
 " 1923. Bill of sale. *Singer & Benedict v. Sheldon*, 346.
 " 1941, 1943, 1944, 1946. Mortgage. *Yerger v. Bars et al.*, 79.
 " 1959. Head of family. *Linton v. Crosby*, 388.
 " 1960. Homestead. *Abbott v. Oreal et al.*, 177.

- Sec. 2007. Homestead. *Linton v. Crosby*, 388.
- " 2130. Mechanic's lien. *Brown v. Wyman et al.*, 453.
- " 2178. Venue. *The Equitable Life Ins. Co. of Iowa v. Gleason et al.*, 49.
- " 2219. Divorce. *Jennings v. Jennings*, 291.
- " 2312. Probate jurisdiction. *Perry et al. v. Drury et al.*, 65; *Ashlock v. Sherman et al.*, 312.
- " 2322. Will. *Ward v. Wolf et al.*, 408.
- " 2350. Trustees. *Perry et al. v. Drury et al.*, 65.
- " 2370. Administrator. *Kelley v. Mann*, 626.
- " 2371. Descent. *Addinson v. Breeding*, 28; *Linton v. Crosby*, 387; *Ward v. Wolf et al.*, 468; *Kelley v. Mann*, 626.
- " 2372. Descent. *McClure v. Johnson*, 621; *Kelley v. Mann*, 626.
- " 2375. Descent. *Ward v. Wolf et al.*, 468.
- " 2408, 2410. Estate. *Smith v. McFadden*, 484.
- " 2410. Descent. *Ward v. Wolf et al.*, 468.
- " 2420. Estate. *Addinson v. Breeding*, 28; *Smith v. McFadden*, 486.
- " 2421. Estate. *Smith v. McFadden*, 486.
- " 2436. Widow's share. *Ward v. Wolf et al.*, 468.
- " 2437, 2441, 2442. Widow's share. *Ward v. Wolf et al.*, 467.
- " 2456. Widow's share. *Ward v. Wolf et al.*, 468.
- " 2476. Administrator. *Diehl v. Miller et al.*, 314.
- " 2507. Action. *The State v. McGlothlen*, 545.
- " 2529. Statute of limitations. *Barnes et al. v. The County of Marshall*, 26; *Shreve v. Leonard*, 75; *Squter et al. v. Parks et al.*, 408; *Gales v. Ballou et al.*, 743.
- " 2530. Statute of limitations. *Shreves v. Leonard*, 75.
- " 2532. Commencement of action. *Proska v. McCormick*, 319.
- " 2545. Parties. *McMurray et al. v. Van Gilder*, 607.
- " 2548. Promissory note. *McNames v. Carpenter*, 717.
- " 2550. Promissory note. *Smith v. McFadden*, 486.
- " 2552. Bond. *Rowley v. Jewett*, 493.
- " 2572, 2573, 2574. Practice. *Bixby v. Blair & Company et al.*, 418.
- " 2581. Venue. *The Equitable Life Ins. Co. of Iowa v. Gleason et al.*, 49.
- " 2589. Change of venue. *Hall v. Royce*, 360.
- " 2599. Commencement of action. *Proska v. McCormick*, 319.
- " 2600. Discontinuance. *Hall v. Royce*, 361.
- " 2647. Practice. *Kimball & Mitchell v. Bryan*, 634.
- " 2648, 2650. Pleading. *McDonald v. Jackson*, 645.
- " 2659. Counter-claim. *Sigler v. Hidy et al.*, 506.
- " 2683. Intervention. *Dunham, Buckley & Co. et al. v. Greenbaum, Ochroder & Co. et al.*, 306.
- " 2737. Damages. *Jones v. Marshall*, 740.
- Sec. 2743. Findings. *Jennings v. Jennings*, 290.
- " 2747. Court records. *Traer Bros. v. Whitman et al.*, 445.
- " 2787. Instructions. *Wells v. The B. & N. R. Co.*, 523.
- " 2803. Practice. *Petrie v. Boyle et al.*, 104.
- " 2832. Practice. *The State v. Newcomb*, 336.
- " 2992. Garnishment. *Coffman v. Ford*, 187.
- " 2994. Attachment. *Allerton v. Eldridge*, 716.
- " 3000, 3001. Attachment. *Allerton v. Eldridge*, 714.
- " 3013, 3019. Attachment. *Pellersells v. Allen et al.*, 718.
- " 3040. Execution. *Flannigan v. Allhouse, Wheeler & Co. et al.*, 514.
- " 3078. Exemption. *Harrier v. Fassett et al.*, 265; *Linton v. Crosby*, 387.
- " 3102, 3103, 3112-3118. Judicial sale. *George v. Hart*, 707.
- " 3164. Appeal. *Allerton v. Eldridge*, 710.
- " 3173. Practice. *Marlow v. Marlow*, 300; *Fairburn v. Goldsmith et al.*, 347; *Cooper v. Dillon et al.*, 368.
- " 3178, 3179, 3181. Appeal. *Fairburn v. Goldsmith et al.*, 348.
- " 3186. Appeal. *Pellersells v. Allen et al.*, 719.
- " 3196. Judgment. *Zimmerman v. National Bank of Winterset*, 134.
- " 3207. Practice in the Supreme Court. *Argall et al. v. Pugh*, 310; *Wilson v. Klotenketter et al.*, 764.
- " 3216. Certiorari. *Carpenter v. Zuver*, 594.
- " 3226. Practice. *Sigler v. Hidy et al.*, 507.
- " 3230. Replevin. *Parker v. Norris*, 296.
- " 3244. Exemption. *Harrier v. Fassett et al.*, 265.
- " 3277. Pleading. *Rogers v. Gillett et al.*, 269.
- " 3317. Foreclosure. *Black v. Howell et al.*, 681; *Sweet, Dempster & Co. v. Oliver et al.*, 746.
- " 3327. Cancellation of mortgage. *Low et al. v. Fox*, 223.
- " 3376. Mandamus. *Perkins v. The Board of Directors of The Independent School District of West Des Moines*, 490.
- " 3191, 3498. Justice of the peace. *Lanpher v. Desell et al.*, 155.
- " 3535. Forcible entry and detainer. *Jordan v. Walker*, 688.
- " 3601. Superedeas. *Pellersells v. Allen et al.*, 719.
- " 3630. Forcible entry and detainer. *Jordan v. Walker*, 688.
- " 3639. Evidence. *McMillan v. The B. & N. R. Co.*, 421.
- " 3790. Costs. *Red v. Polk County*, 99.
- " 3853. Robbery. *The State v. Leighton*, 596.
- " 3905. Larceny. *The State v. Gleason*, 205.
- " 3917, 3918, 3923, 3926. Indictment. *The State v. McCormack*, 587.
- " 3932, 3933. Public officer. *McCue v. The County of Wapello*, 705.
- " 4013. Former conviction. *The State v. Holmes*, 691.
- " 4066. Selling diseased animals. *Gunderson v. Richardson*, 69.

- Sec. 4091. Nuisance. *The State v. Holmes*, 591.
 " 4099, 4102. Libel. *The State v. Rice*, 433.
 " 4300. Indictment. *The State v. McCormack*, 538.
 " 4481, 4482, 4483, 4484, 4485, 4486. Practice. *The State v. Newcomb*, 336.
 " 4559, 4560. Evidence. *The State v. McEllothlen*, 545.
 " 4689. Imprisonment. *Lanpher v. Dewell et al.*, 155.
 " 4720. Practice. *The State v. McGlothlen*, 545.
 " 4721, 4735. County jail. *Feldenheimer v. The County of Woodbury*, 379.
 " 4747. Penitentiary. *The State v. Heisey et al.*, 405.

LAWS OF 1870.

- Chap. 102, sec. 3. Local aid taxes. *Barnes et al. v. The County of Marshall*, 22.

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- Chap. 43. Additional penitentiary. *The State v. Heisey et al.*, 405.

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- Chap. 56. Appeals. *Fairburn v. Goldsmith et al.*, 348.
 " 68. Railroad tariffs. *Paxon v. The Illinois Central R. Co.*, 429.

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- Chap. 24. Municipal corporations. *The Town of New Hampton v. Conroy*, 499.
 " 100, secs. 2, 6, 9. Mechanic's lien. *Bissell v. Lewis et al.*, 235, et seq.

LAWS OF 1878.

- Chap. 145. Practice in the Supreme Court. *Tuttle v. Story County*, 317; *Tabor v. Foy*, 543.

STATUTE OF FRAUDS.

1. ACCEPTANCE: WHEN VALID IN PAROL. A verbal acceptance of an order is valid and enforceable only where the drawee has funds of the drawer in his hands, so that by payment of the order he satisfies his own debt. *Walton v. Mandeville, Dowling & Co.*, 597.

STATUTE OF LIMITATIONS.

1. ACTION TO RECOVER OVER-PAYMENT: FAILURE TO CREDIT PAYMENT. Where a judgment plaintiff failed to credit a payment made on the judgment, and afterward collected the whole amount thereof on execution, it was held that an action to recover the amount overpaid was barred in five years from the date of the collection of the judgment, although the party making the payment had no knowledge that it had not been properly credited until after the expiration of that time. *Shreves v. Leonard*, 74.
2. ESTATE: DISTRIBUTION OF. Where by the terms of an agreement between the heirs of a decedent certain of the heirs were to receive an additional allowance upon final distribution of the estate, it was held that such distribution related to real as well as personal estate, and that a claim for such allowance set up in an action for the partition of the last remaining real estate of the decedent was not barred by the statute of limitations, although more than ten years had elapsed since the making of the agreement. *Rogers v. Gillett et al.*, 266.
3. ———. The claim for such additional allowance was not one that could be proved against the estate, and which therefore would be barred if not filed within a year from granting the administration. *Id.*
4. EFFECT OF FILING MECHANIC'S LIEN. The fact that a claim for a mechanic's lien is filed and then allowed to become barred by the statute of limitations will not operate to bar an action to recover the indebtedness on which the claim is founded. *Kimball & Mitchell v. Bryan*, 632.
5. WHO MAY PLEAD: MECHANIC'S LIEN. One having an interest in real estate, who is not made a party to an action to foreclose a mechanic's lien thereon, may resist the enforcement of the decree by injunction on

the ground that the action was barred by the statute of limitations. *Gates v. Ballou et al.*, 741.

See MECHANIC'S LIEN, 8.

MORTGAGE, 7.

TAX SALE AND DEED, 1, 3, 9, 11, 12, 13.

SURETY.

See BOND, 3.

PROMISSORY NOTE, 5, 6.

TAXATION.

1. **PROPERTY OF BENEVOLENT SOCIETY: WHEN NOT EXEMPT.** A building owned by a benevolent society and leased for pecuniary profit is taxable, although built with a fund which was exempt, and into which the rents are paid. *Fort Des Moines Lodge I. O. O. F. v. The County of Polk et al.*, 34.
2. **IN AID OF RAILROADS: CONDITIONS OF TAX.** Where, prior to an election to vote upon the question of aiding in the construction of a certain railroad by a township tax, a paper was circulated among the electors, signed by the president of the railway company and having the corporate seal attached, providing that in case a tax was voted it should be collectible only at specified times and on certain conditions, which paper was issued by and with the consent of a majority of the directors of the company, it was held that the company was bound by its provisions. *Meeker & Co. v. Ashley et al.*, 188.
3. ———: ———. Where a tax is voted payable only on condition that the road is constructed and ironed to a certain point, such condition is not fulfilled by the construction of a part of the line and the purchase of the remaining portion. *Id.*
4. **SITUS OF PROPERTY: PERSONALTY IN HANDS OF ADMINISTRATOR.** Where the administrator of an estate, having personal property thereof in his possession, resides in the same county in which his decedent died, but in a different township, such property is taxable in the township of his residence. *Cameron v. The City of Burlington*, 320.
5. **PERSONALTY: TO WHOM TAXABLE.** Under the statutes of this State personal property is taxable to the person owning the same on the first day of January, and its assessment to one who acquires the ownership between that time and the date when the assessment is made is illegal. *Wangler Bros. v. Black Hawk County*, 384.
6. ———: **WHEN IT BECOMES TAXABLE.** Personal property brought into the State after the first day of January is not, under our statute, taxable for that year. *Id.*
7. **IN AID OF RAILROADS: CONDITIONS OF TAX.** Where by the conditions of a tax voted in aid of a railroad it was not to be payable until the road was constructed between two specified points, the construction of a portion of the line and the purchase of the remaining portion will not render the tax payable, although the constructed portion extends through the township in which the tax is voted. *I. M. & N. P. R. Co. et al. v. Schenck et al.*, 628.

TAXES.

1. **RECOVERY OF LOCAL AID TAXES: LIABILITY OF COUNTY.** A county acquires no beneficial interest in taxes voted in aid of a railroad and paid to the county treasurer, and cannot be held responsible for their repayment when forfeited by the railroad company. The claim of the taxpayer for the recovery of such taxes is against the fund in the hands of the treasurer, and not against the county, and no order of the board of supervisors is necessary to authorize their repayment. *BECK and SEEVERS, JJ., dissenting. Barnes et al. v. The County of Marshall, 20.*

See SCHOOL DISTRICT, 1, 2.

TAX SALE AND DEED, 4.

TAX SALE AND DEED.

1. **SALE: ACTION TO RECOVER POSSESSION: STATUTE OF LIMITATIONS.** Facts considered under which it was held that an action to recover possession of land under a tax deed was not barred by the statute of limitations. *Jordan et al. v. Brown et al., 281.*
2. — : **DEED HELD AS SECURITY: REDEMPTION.** Where the holder of a judgment procured a tax deed to lands of the judgment debtor, which he agreed should be subject to redemption by the payment of the judgment, it was held that other claimants to the land, against whom, but for such agreement, the tax sale would have conveyed an absolute title, could only redeem therefrom by complying with the terms of the agreement. *Id.*
3. **DEED: POSSESSION: STATUTE OF LIMITATIONS.** The cutting of timber and hay from a tract of land by the owner of the patent title, under a claim of exclusive right, constitute such acts of possession as will support a plea of the statute of limitations to an action on a tax deed, executed more than five years prior to the commencement of the action. *Forrey v. Bigelow et al., 381.*
4. — : **RECOVERY OF TAXES PAID: SUBSEQUENT PURCHASER.** The holder of a tax deed which fails cannot recover the amount of taxes paid on the property from one who purchased the land subsequent to such payment and without a knowledge thereof. *Id.*
5. — : **EFFECT OF AS EVIDENCE: NOTICE TO REDEEM.** A tax deed is not conclusive evidence of the giving of notice when the time for redemption from the sale would expire. Following *Reed v. Thompson, ante, 455. Wilson v. Crafts, 450.*
6. — : **VALIDITY OF: EVIDENCE.** Where a notice of the expiration of time for redemption from a tax sale, and a proof of service thereof, are regular on their face and a deed is executed in accordance therewith, any person asserting the invalidity of the deed on the ground that service of the notice was not made as the proof shows, or was not made upon the proper persons, has the burden of overcoming the *prima facie* evidence furnished by the papers. *Id.*
7. — : **EFFECT OF AS EVIDENCE: NOTICE TO REDEEM.** A tax deed is not conclusive evidence that proper notice of the expiration of the time for redemption from the sale was given. *Reed v. Thompson, 455.*
8. — : **PRESUMPTION OF REGULARITY.** Evidence held sufficient to overcome the presumption in favor of the recitals in a tax deed. *Hogdon v. Green, 183.*

9. ———: SALE EN MASSE: STATUTE OF LIMITATIONS. The validity of a tax deed cannot be questioned, on the ground that it shows on its face that several tracts of land were sold in mass, after the expiration of five years from the date of its execution. *Bullis v. Marsh et al.*, 747.
10. ———: AS EVIDENCE: REGULARITY OF PROCEEDINGS. A tax deed is conclusive evidence that the lands described therein were properly advertised for sale, and at least *prima facie* evidence that a proper adjournment was made to the day on which the sale took place. It is not essential that such adjournment should be shown by the records. *Id.*
11. SALE: STATUTE OF LIMITATIONS: VOIDABLE SALE. The legality of a tax sale which is voidable only cannot be sustained after the expiration of five years from the date of the execution of the deed thereon. *Id.*
12. ———: ———: POSSESSION. Where land remains unoccupied the title of the holder of a tax deed thereto becomes perfect at the expiration of five years from the date of its execution. Following *Moingona Coal Co. v. Blair*, 51 Iowa, 447. *Id.*
13. ———: REGULARITY OF: EVIDENCE. The fact that the tax sale register does not show an offering for sale of lands on the first Monday in October is not conclusive evidence that they were not so offered, nor sufficient to overcome the presumption in favor of the validity of a tax deed. *Id.*

TORT.

1. WHEN DAMAGES ARE NOT RECOVERABLE FOR. The police judge of a city cannot maintain an action against the mayor and members of the city council to recover damages because of the passage of an ordinance requiring him to pay the fees of his office into the city treasury, and giving him a salary in lieu thereof for his services. *McHenry v. Sneer et al.* 649.
2. ———. Neither can he recover damages from them because of directions given by them to the police to report violations of law to justices of the peace rather than the police court. *Id.*
3. ———. The fact that the defendants conspired together for the injury of the plaintiff will not constitute a cause of action against them where they did no unlawful act. *Id.*

See PRACTICE, 2.

TRESPASS.

1. WRONGFUL SEIZURE OF PROPERTY: REMEDY. Where property is wrongfully seized and sold under a chattel mortgage the owner is not confined to his remedy by contesting the foreclosure of the mortgage, but may maintain at once an action at law to recover the property or its value. *Black v. Howell et al.*, 630.

TRUST.

See WILL, 1, 3.

USURY.

1. COMMISSIONS TO AGENT. The fact that the agent of a borrower, who is paid a commission in excess of legal interest by the latter for procuring

a loan, divides such commission with the agents of the lender will not render the loan usurious. *Dickey et al. v. Brown et al.*, 428.

2. **WHERE NO DEFENSE: MONEY BORROWED TO PAY USURIOUS DEBT.** One who borrows money at a legal rate of interest to pay an usurious debt cannot maintain a plea of usury against the new creditor by showing that he knew the debt paid with the borrowed money was usurious. *Mason v. Searles et al.*, 532.

VENDOR'S LIEN.

1. **WAIVER OF: TAKING OF OTHER SECURITY.** Where the vendor of real estate took in part payment therefor the secured note of a third person, indorsed by the vendee, it was held that he thereby waived his right to a vendor's lien, though the security taken afterward proved worthless, it being considered good by all the parties at the time it was taken. *Kendrick et al. v. Eggleston et al.*, 128.

See VENDOR AND VENDEE, 2.

VENDOR AND VENDEE.

1. **ASSIGNEE OF CONTRACT: PERSONAL LIABILITY OF.** The assignee of a contract for the sale of real estate, by accepting the assignment, becomes a party to the contract, and personally liable thereon for the purchase money then unpaid. *Wightman v. Spofford et al.*, 145.
2. **VENDOR'S LIEN: WAIVER OF.** A vendor who takes in payment for land sold a promissory note with a surety thereby waives his right to a lien, which is not reinstated by the fact that the surety becomes insolvent before the maturity of the note. *Akers v. Luse et al.*, 346.

See CONTRACT, 14, 15, 16, 17.

EVIDENCE, 6.

PROMISSORY NOTE, 8.

VENUE.

1. **ACTION IN REPLEVIN: EVIDENCE.** The exclusion of evidence offered in support of a motion for change of venue, and tending to prove that the action was not brought in the proper county, held erroneous. *Parker v. Norris*, 295.

See PRACTICE, 1, 17, 39.

VERDICT.

1. **HELD EXCESSIVE.** A verdict held excessive under the evidence and special findings. *Montelius v. Ward*, 295.

See PRACTICE, 4.

WILL.

1. **TRUST CREATED BY: BOND REQUIRED OF TRUSTEES.** Persons to whom personal property is bequeathed by will, and who are charged with certain trust duties in respect thereto, are properly legatees, and not trustees within the meaning of section 2350 of the Code, requiring trustees

under a will to give bonds. Such provision applies only to those who take property to hold for a determinate period, at the expiration of which it is to be transferred to the beneficiaries, and during the continuance of which period the estate remains unsettled and under the supervision of the probate court. *SEEVERS, J., dissenting. Perry et al. v. Drury et al., 60.*

2. **CONVEYANCE BY TESTATOR AFTER DEVISE: EFFECT OF.** Where a testator undertakes to dispose of both personal and real estate, and he subsequently conveys the real estate, it will not, in general, work a revocation of the will as to the personal property of which he died seized. *Warren v. Taylor et al., 182.*
3. **CONSTRUCTION OF: TRUST: DOWER.** Where a decedent by will bequeathed all his property to his wife, to control the same and have all the profits arising therefrom, "for the purpose of raising, clothing, and educating" their children, until such time as the youngest child should attain a specified age, when the property was to be divided, it was held that under the will the widow took the property in trust, for the sole benefit of the children, and that she was entitled to have her distributive share set apart to her at once, under the statute, without relinquishing her trust under the will as to the remaining two-thirds. *Rittgers v. Rittgers et al., 218.*
4. **PERSONALTY: WIDOW'S SHARE.** The widow's share of her husband's property provided for in section 2452 of the Code includes both personal and real property, and a husband cannot by a will, made either before or after marriage, deprive his widow of her share in his personal estate. *SEEVERS and DAY, JJ., dissenting. Ward v. Wolf et al., 465.*

See DOWER, 2.

EQUITABLE JURISDICTION, 3.

LIFE INSURANCE, 1.

Ex. G. A. A.

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